

1968

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Samuels v Republic [1968] 1 EA 1 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 8 September 1967
Case Number: 700/1967
Before: Sir John Ainley CJ and Rudd J
Sourced by: LawAfrica

[1] Criminal Law – Removal from Kenya of foreigner – Recommendation for – Whether jurisdiction exists to order removal after completion of part of sentence – When should be made – Exchange Control offence and forgery – Penal Code, s. 26 (a) (K.).

[2] Criminal Law – Forgery – Knowingly and fraudulently uttering false official document – Meaning of “fraudulently” – Whether includes intent to deceive public officer without intent to cause economic loss – Penal Code, s. 353 (K.).

[3] Criminal Law – Forgery – Uttering false official document – Whether entry made in expired passport for exchange control purposes is “official document” – Penal Code, s. 353 (K.).

Editor’s Summary

The appellant, a foreigner, entered Kenya in July, 1965. Exchange control had just been introduced and passengers coming from outside East Africa had to declare what currency they carried. A record of the amount of currency, other than East African currency, was then entered in their passports. The appellant declared £B22 Os. Od., and a customs officer entered that amount on the British passport of the appellant, stamped the entry with an official stamp, and signed it. Subsequently the appellant added a

number of false entries after the amount of £B22 Os. Od. above the signature of the preventive officer, including an entry "E.A. Shs. 1,500,000/-". In May, 1967, after the validity of this passport had expired, the appellant came to Nairobi airport with some £K.18,000 of Kenya currency, clearly intending to leave Kenya with it in breach of the exchange control regulations. In trying to leave he produced the expired passport with the false entries in it to an investigating officer, and claimed that the money he had with him was only money which he had brought into Kenya. He was convicted of knowingly and fraudulently uttering a false official document, and was sentenced to two and a half years' imprisonment for this offence and also for offences under the customs and exchange control laws. He appealed. On appeal it was argued that the passport, having expired, was not an "official document"; that there had been no intent to defraud, i.e. to cause economic loss to the person to whom it was uttered, such intent being a necessary ingredient of the offence, but only an intent to burke inquiry; and that the sentence was

excessive. It was also suggested that the court should recommend his removal from the country after he had served part of this sentence.

Held –

- (i) the page in the passport on which the entry was made by the customs officer was a record made by an official for officials the validity of which never expired and never could expire, and it was still an “official document” notwithstanding the expiry of the passport;
- (ii) although it is proper in the context of forgery and uttering to equate “fraudulently” with “intent to defraud”, nevertheless “to defraud” is not confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss;
- (iii) the appellant by uttering this false document intended to deceive public officers and by that deceit to cause them to take action which they would not otherwise have taken or to refrain from action which they would otherwise have taken, and that intent was fraudulent (*Welham v. D.P.P.* (2) applied);
- (iv) the sentence was proper;
- (v) the power to recommend removal under s. 26 (a) of the Penal Code is a power to recommend immediate removal or else removal on completion of sentence. There is no halfway house.

Appeal dismissed. Appellant recommended for removal on the completion of his sentence.

Cases referred to in judgment:

- (1) *Mahendra Raja Jain v. Republic*, [1966] E.A. 319.
- (2) *Welham v. Director of Public Prosecutions*, [1961] A.C. 103.
- (3) *R. v. Toshack* (1849), 4 Cox C.C. 38.

Judgment

Sir John Ainley CJ: delivered the following judgment of the Court: In this case the appellant was convicted of uttering a false official document, contrary to s. 353 of the Penal Code, and he was sentenced to two and a half years’ imprisonment.

He appeals from conviction and sentence.

The particulars of the offence set out in the charge sheet read as follows:

“*SAMUEL TSVI SAMUELS*: On the 13th day of May, 1967, at Nairobi in the Nairobi Area, knowingly and fraudulently uttered a certain forged document, namely, a certain entry in a cancelled British Passport No. 138386 purporting to be an official entry of the East African Customs and Excise Department shewing *inter alia* that the said Samuel Tsvi Samuels had on the 8th July, 1965, physically imported East African Shs. 1,500,000/- into Kenya.”

There has been very little dispute about the facts. On May 13 this year the appellant came to Nairobi Airport carrying with him some £18,000 worth of Kenya currency with which it was clearly his intention to leave Kenya. He had no lawful authority to take that currency out of the country, and he was convicted in other proceedings of an offence contrary to s. 147 (c) (ii) of the East African Customs Management

Act 1952, and s. 24 of the Exchange Control Act.

Besides this vast amount of currency the appellant carried, in addition to his current passport, a British passport which had no longer in May, 1967, any validity, but which was valid when the appellant entered Kenya at Nairobi Airport on July 8, 1965, on what seems to have been a visitor's pass.

Exchange control was introduced in Kenya in June, 1965, and it was in evidence that throughout July, 1965 all incoming passengers save those from what was then Tanganyika and from Uganda were asked by the preventive officers to declare what currency they carried. On occasion a physical check was made of the currency carried by passengers.

If currency other than an East African currency was carried by the passenger the amount was written down on a page of the passenger's passport by the preventive officer concerned. If more than £25 worth of East African money was carried the excess was taken into safe keeping and a receipt issued, but no entry was made in the passport. Now when the appellant entered the country he was questioned about the currency he carried by a preventive officer of the Customs and Excise Department who was the first prosecution witness in the court below, one Piara Singh. To Mr. Singh the appellant declared that he had £22 0s. 0d. Sterling with him. Mr. Singh then made on p. 30 of the British passport the entry "Into Kenya LY 141 on 8.7.65" and thereunder "Sterling £22 0s. 0d.". Mr. Singh next stamped the page with one of the official East African Customs and Excise stamps which read "E.A. Customs and Excise, 8th July, 1965, Nairobi Airport, Nairobi, Kenya" and signed over the stamped impression. All that, this official said, and no one doubts that what he said was true, was an entry made in the course of his duty. An entry of this kind, moreover, cannot be regarded as a mere aide memoire for the visitor to Kenya. It was at the time in question the position, and the matter was brought to the attention of the court below, that a non-resident, tourist, or visitor could take out of Kenya the same amount of money in foreign currency as he brought in.

Thus the entry made by Mr. Singh on p. 30 of the appellant's passport was at the least intended for the scrutiny of public officers if and when the question of what money could be taken from the country by the appellant arose. There may well have been other official reasons for making this record on a page of the appellant's travel document, but no one can doubt that this record was made by an official in the course of his duty for the use of other officials.

Now the appellant, though he was not charged with it, clearly caused much to be added to p. 30 of this passport below the entry, "Into Kenya LY 141 on 8.7.65" which was made by Mr. Singh. There was added a series of entries relating to foreign currencies finishing with "E.A. Shs. 1,500,000, One million and five hundred thousand E.A. shillings". This last entry is, if we may use the expression, tangled up with the signature of Mr. Singh and the official stamp to which reference has been made. But though the attempted deception may not have been a very clever one an attempt at deception was made, and the intention behind the making of the additions was very clearly to induce the belief that on July 8, 1965, the appellant entered Kenya with, *inter alia*, one and a half million East African shillings, and that the official whose duty it was to inquire into these matters made, signed, and stamped an entry to that effect.

To continue with the narrative, the appellant when checked in his attempt to leave the country with the small fortune in currency to which we have referred, and when reminded that he could only take out Shs. 250/- said, "I am declaring only what I brought in". It was pointed out to him that nothing relevant had been entered on his current passport, and he then produced from an inside pocket the passport which contained the false entries we have mentioned, opened it at p. 30 and handed it over to the investigating officer who was questioning him. The investigating officer was not impressed with the entries on p. 30. The appellant was urged to produce all he had and from sundry packages, a typewriter case, a body belt and other places of concealment the East African currency emerged. During these proceedings the appellant said more than once. "This is only money that I brought into Kenya."

It was upon these facts that the learned magistrate convicted the appellant of the charge preferred.

It is first said that even if this document was a false document it was not an official document. The argument here was based upon the assertion that though a passport is an official document so long as it is valid as a passport it ceases to be an official document when it ceases to be an effective passport. The learned magistrate met this argument head-on by saying:

“The argument that a passport once cancelled ceases to be an official document is not one to which I can subscribe. It may no longer be current but I cannot see that it ceases to be an official document.”

We think that the learned magistrate was right there, but in truth neither the argument nor counter argument were very relevant. The appellant was not charged with uttering a forged passport. He was charged, in effect, with uttering p. 30 of this expired passport. Page 30 when Mr. Singh had finished with it was a record by an official for officials. The validity of that entry never expired, and never could expire. It purported to be the record of a fact and it was an official record of a fact. We make no doubt whatever that when Mr. Singh had finished with it, it was an official document, and when the appellant had caused the false entries to be made it was a false official document. It was a forged document. It is admitted that it told a lie, and very obviously it told a lie about itself for it purported to be a record made solely by Mr. Singh, a preventive officer, on a particular date, and of course it was no such thing. It was a document purporting to be what in fact it was not. That the appellant knew that the document was a false document cannot be doubted.

Now since this document was, beyond all argument, uttered by the appellant, one matter only remains for consideration and that is whether he uttered it fraudulently. Counsel for the respondent has addressed some interesting arguments to us which were directed to show that the word “fraudulently” in s. 353 of the Penal Code may have a wider meaning than the phrase “intent to defraud” and may include a mere intent to deceive, but with respect we really do not see why that should be so and we think it proper in the context of forgery and uttering to equate “fraudulently” with “intent to defraud”. We note that the Court of Appeal for Eastern Africa took the same view in *Mahendra Raja Jain v. Republic* ([1966] E.A. 319). But having said so much we yet realize the need to advance circumspectly. The word “defraud” is an English word of respectable antiquity and is one which has been used in Acts concerned to punish forgery at least as early as 1830, yet as late as 1961 the meaning of the word was being elaborately discussed in *Welham v. Director of Public Prosecutions* ([1961] A.C. at p. 123). The appeal before the House of Lords in that case concerned the uttering of certain forged hire purchase agreements on the strength of which finance companies advanced money to a concern known as Motors (Brighton) Ltd. Welham, who uttered the forgeries, said that he did so to deceive the public authorities who were concerned with credit restrictions and not to defraud the finance companies, or anyone else. The jury were directed that this admitted intention was an intention to defraud. The House of Lords held that direction to be correct.

Lord Radcliffe moved quickly to the conclusion, with which we very respectfully agree, that neither in ordinary speech nor in law is the expression “to defraud” confined to the idea of depriving a man by deceit of some economic advantage or inflicting upon him some economic loss. He said ([1961] A.C. at p. 124):

“... In that special line of cases where the person deceived is a public authority or a person holding a public office, deceit may secure an advantage

for the deceiver without causing anything that can fairly be called either a pecuniary or an economic injury to the person deceived. If there could be no intent to defraud in the eyes of the law without an intent to inflict a pecuniary or economic injury, such cases as these could not have been punished as forgeries at common law, in which an intent to defraud is an essential element of the offence, yet I am satisfied that they were regularly so treated.”

He then quoted three cases, the last being the case of *R. v. Toshack* ((1849), 4 Cox C.C. 38). This was the case of a testimonial forged over the purported signature of the master of a sailing ship in order to deceive the Trinity House examiners, and so obtain a master’s certificate. The forger was charged on a count which alleged an intent to injure, deceive, prejudice and defraud the examiner and that he did the same thing for the purpose of deceiving Trinity House. He was convicted of the offence of forgery at common law, and the unanimous opinion of six judges including Pollock, C.B. and Alderson, B. was that the conviction was right. Lord Radcliffe made this comment ([1961] A.C. at p. 125) upon *Toshack’s* case:

“In my opinion it is clear that in connection with this offence the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit, or not doing something that but for it he would have done. Correspondingly, to put such a document forward with knowledge of its falsity and with a similar intent was to commit the crime of uttering it. That seems to me to be the essential point of the present appeal.”

Lord Denning said ([1961] A.C. at p. 134):

“Welham on his own evidence had an intent to defraud, because he uttered the hire-purchase documents for the purpose of fraud and deceit. He intended to practice a fraud on whomsoever might be called upon to investigate the loans made by the finance companies to the motor dealers. Such a person might be prejudiced in his investigation by the fraud. That is enough to show an intent to defraud. I think the Common Serjeant was entitled to direct the jury as he did.”

We turn now to the intent of the appellant in the present case. It was said by counsel on his behalf that the intent of the appellant was, the worst having come to the worst, to burke inquiry into the sources of the huge sum he carried. If such was the intent it falls we think squarely within all that was said in *Welham’s* case ([1961] A.C. 103) and certainly squarely within the wording of those passages from the judgments of Lord Radcliffe and Lord Denning which we have quoted. If such was the intent it was a fraudulent intent.

The appellant himself in an unsworn statement to the court below appears to bear out what counsel has said, but this statement is ambiguous. The one clear and positive assertion made is that the false document was not uttered in an attempt by the appellant to bluff his way through with the money. The learned magistrate did not, we think, believe this assertion. He said:

“I think it is clear that accused’s intention was not only to deceive but to cause Mr. Brooks (the officer to whom the document was uttered) to act to the prejudice or detriment of the exchange control which he represented and thereby to defraud.”

The learned magistrate chose, we think, what was one of the more obviously possible intentions. Though he could not perhaps have believed that the appellant confidently expected to deceive Mr. Brooks, he did believe this at least that the

appellant sought to do so and desperately hoped to do so. It is impossible to say that the magistrate came to an unreasonable finding there.

It does not require much ingenuity to think of other possible intentions, but it is impossible, we think, to conjure up any intention which was not fraudulent within the meaning given to that word by the House of Lords in *Welham's* case (*supra*). Beyond all doubt the appellant intended by uttering this false document to deceive public officers, and by that deceit to cause them to take action which they would not otherwise have taken or to refrain from action which they would otherwise have taken. Beyond all question, or so we think, if the appellant so intended his intent was fraudulent; he uttered this document knowingly and fraudulently. Though we have written much this was a very clear case and the conviction was perfectly proper.

We turn now to the sentence which was heavy but which was ordered to run concurrently with the sentence passed in Nairobi Criminal Case 1353/67 to which we have referred. For the whole transaction in which he engaged the appellant has been sent to prison for a total period of two and a half years. This transaction comprised an attempt to evade the laws relating to currency control on a great scale and the use in an effort to mislead and baffle public officers of a forged document. Whether he was in possession of his own money (which is very unlikely) or whether he was "running" currency for others he treated with contempt laws which for the protection of this country's currency must be obeyed.

We do not think the sentence excessive, and we dismiss the appeal.

We are aware of the provisions of s. 26 (a) of the Penal Code. The alternatives posed by that section appear to us to be a recommendation of immediate removal or a recommendation of removal on the completion of the sentence. There is no halfway house. In our opinion men of this kind should be punished, and foreigners contemplating similar activities should not suppose that the worst they may expect is expulsion from Kenya without the money they sought to export. We recommend that the appellant be removed from and remain out of the country on the completion of his sentence. This recommendation shall be conveyed to the Minister.

Appeal dismissed.

For the appellant

Sir William O'Brien Lindsay

Hamilton Harrison & Mathews, Nairobi

For the respondent:

JR Hobbs (Deputy Public Prosecutor, Kenya)

Attorney-General, Kenya

Trustees for the Port of Aden v Hathadaru and another
[1968] 1 EA 7 (JCPC)

Division: Judicial Committee of the Privy Council

Date of judgment: 15 November 1967

Case Number: 30/1966 (1/68)
Before: Lord Pearce, Lord Upjohn and Lord Pearson
Sourced by: LawAfrica
Appeal from: Court of Appeal for Eastern Africa

[1] Landlord and Tenant – Construction of lease – Option to purchase granted to lessee on certain conditions – Whether lessor obliged to call upon lessee to exercise option.

Editor's Summary

This was an appeal from a decision of the Court of Appeal for Eastern Africa reversing a judgment of Blandford, J. in the High Court of Aden. The trustees of the port of Aden and the predecessors of the respondents entered into a lease in 1932 under which certain land was leased to the respondents to provide facilities for coolies living within the area of the port and earning their living by carrying coal and cargo on to the ships within the port. The lease contained, *inter alia*, a proviso to the effect that if the plot of land ceased to be used for the purpose for which it had been granted, the lessees, upon being called upon to do so in writing by the lessors, should purchase the said land at Rs. 5/- per square yard and on their refusing so to do, the lease should thereupon be deemed to determine. In 1957, more modern facilities were built for the coolies and they ceased to occupy the land in question. The point at issue was whether, in these circumstances, the lessors were bound to call upon the lessees to elect whether they would purchase the land at the price laid down or would exercise their right of refusal.

Held –

- (i) no right in the lessee to purchase the land arose until two things had happened; first, that the land should have ceased to be used for coolie lines and secondly, that the lessors should have called upon the lessees by a notice in writing to purchase the land;
- (ii) there was nothing in the proviso which compelled the lessors to give such notice.

Appeal allowed with costs; cross-appeal dismissed with costs to the appellant.

No cases referred to in judgment

Judgment

Lord Upjohn: delivered the following reasons for the report of the committee: In 1928 in the Port of Aden a plague of smallpox broke out originating with coolies who were living in the port and earning their living by carrying coals and cargo on to the ships that called in the port. It appears that some thousands of them lived in bad conditions without any proper housing so that the Government called in conference the shipping and other companies concerned to devise some amelioration of these conditions. It was then arranged as a result of a number of meetings between the Resident and his advisers and these companies that coolie lines should be provided by the companies upon the terms that the Residency or the local public bodies would provide up to 50 per cent. of the total cost of buildings and site. This assistance was to be given in the form of (1) a free site (2) abatement from usual house tax (3) latrines

and washing places which were to be constructed by the local public bodies and

(4) a cash grant. It was also agreed at these meetings that if the site to be granted by the local government was used for any other purpose than coolie lines then it must be paid for, in order to safeguard the public interest. To carry out this general scheme a number of leases were arranged between the trustees of the port of Aden (the predecessors of the appellants the latter being incorporated in 1951 by the Port Trust Ordinance to take over their predecessors' property functions and duties) and the various shipping companies who came into the scheme. Their Lordships are concerned with the lease dated January 9, 1932 between the trustees of the port of Aden and the predecessors of the respondents. This lease was duly sanctioned by the Governor of Bombay, then responsible for the administration of Aden, as was required by the Aden Port Trust Act 1888.

The whole question in dispute before their Lordships depends upon the construction of this lease and in particular upon the terms of certain covenants whereby the lessees covenanted with the lessors in the terms following:

“(1) The said plot of land shall be used only for purposes of accommodation of coolies employed in the handling of coal or cargo for ships.”

By sub-cl. (2) the lessees covenanted to observe rules for the time being in force relating to the use, occupation and transfer of the land thereby demised and by cl. (3) they covenanted that the only buildings to be erected on the plot should be coolies' quarters erected in accordance with certain plans. Then a proviso followed which contains the all important question in this case and their Lordships therefore set it out in full.

“Provided always and it is hereby agreed and declared as follows:

- (a) That the price of land shall be fixed at Rs. 2-8-0 per square yard of the purpose of the grant of indirect contribution towards the housing schemes of coal and cargo coolies mentioned in cl. (1).
- (b) That if the said plot of land is not used for the purpose for which it is granted within one year from the date of these presents or if at any time during the term for which this lease is granted the said plot of land shall cease to be used for such purpose then the lessees shall upon being called upon so to do in writing by the lessors forthwith purchase the said plot of land at the price of Rs. 5/- per square yard PROVIDED that if the lessees are unwilling to do this they may refuse but upon such refusal this lease shall be deemed immediately to determine and the land shall be surrendered to the lessors.”

Proviso (c) provided for a right of re-entry by the lessors upon a breach of covenant. Proviso (d) provided for a right of re-entry by the lessors if the land was required by the Government for public purposes. There followed a number of further conditions which their Lordships do not think it is necessary to mention.

These arrangements were duly carried out and the coolie lines were built at a total cost of nearly Rs. 26,000 the predecessors of the respondents contributing about 50 per cent. in cash for building; the Government and port trust contributing the remaining 50 per cent. partly in cash, partly by provision of the land and abatement of tax and the cost of the latrines, as mentioned earlier.

The coolies continued to occupy these buildings until the year 1957 when more modern accommodation was built and the coolies ceased to occupy the original lines.

The sole question which has been argued upon this appeal is whether in these circumstances having regard to the terms of proviso (b) the lessors are

bound to call upon the lessees to elect whether they will purchase the land at the price of Rs. 5/- per square yard or exercise their right to refuse so to do whereupon it is common ground that the lease will immediately be determined. The Court of Appeal reversing the judgment of Blandford, J., held that the lessors were so entitled. Sir Clement De Lestang, Ag. V.-P. expressed their reason for reaching this decision in this way:

“In my view it was clearly the intention of the parties that the lease should come to an end on the fortuitous cesser of user for which neither lessors nor lessees were to blame and that in such an event in order to give efficacy to the clause in question it must be understood as imposing an obligation on the lessors to call upon the lessees to elect whether to purchase or not.”

Blandford, J., had reached the opposite conclusion. He said this:

“In my view the meaning of the proviso is quite clear. It contains two conditions precedent. First there must have been the particular breach of condition on the lessees’ part. Secondly, the lessor must have given a written notice, which it was not bound to do. On the happening of both these events the lessee was bound to purchase at the fixed price and, if he failed, the lease was deemed to be surrendered. In other words the option was to be the lessor’s and not the lessee’s. The initiative rested with the lessor under proviso (b) just as much as it did under the provisos for re-entry contained in cl. (c) and (d).”

It is true that Blandford, J. considered that the cesser of the user by the respondents of the demised premises for coolie lines amounted to a breach of covenant (1) while the Court of Appeal took a contrary view. Their Lordships prefer the view of the Court of Appeal but it is not necessary to express a final view thereon for they are of opinion that this question cannot affect clear words of proviso (b).

Counsel for the appellants did not base any argument in reliance on an alleged breach of covenant by the respondents but he stressed that it would be most unlikely of the lessors to give an option to the lessees to purchase at Rs. 5/- for as he rightly pointed out it was in effect only an option to purchase at an under-value: for if the land was worth less than Rs. 5/- per square yard they need not purchase the land. While this is quite true their Lordships do not think that in the times of depression in the 1930s the parties would necessarily contemplate the possibility of a very large rise in the value of the land due to inflationary and other causes and their Lordships cannot give any weight to this circumstance.

It seems to their Lordships purely a question of construction of proviso (b) and although the lease as a whole has been criticised both by counsel for the appellants and for the respondents their Lordships think notwithstanding counsel for the respondents’ able argument that the relevant provision is quite clear and unambiguous and as the learned trial judge said it seems to their Lordships that if the land ceased to be used for coolie quarters the initiative to bring the lease to an end is to rest with the lessors. No right in the lessee to purchase the land arises until two events have happened. First, that the land shall cease to be used for coolie lines and secondly, that the lessors shall call upon the lessees by a notice in writing to purchase the land. Their Lordships can see nothing in the proviso which compels, as the Court of Appeal held, the lessors to give such a notice. It seems to their Lordships that the option is with the lessors and if the construction adopted by the Court of Appeal were correct the words “upon being called upon so to do in writing” would be completely redundant. In their Lordships’ opinion this proviso would have

been drafted in a very different manner had it been intended by the parties that the lessees should have an option to purchase on the cesser of user by the coolies and a perfectly simple clause could have been drafted to this end. It seems to their Lordships on these short grounds that the construction adopted by Blandford, J. is clearly right.

In these circumstances it has not been necessary to consider and their Lordships have heard no argument upon the cross-appeal namely whether had the lessees been entitled to exercise the option the consent of the Government of Aden was necessary under the Port Trust Ordinance.

The result no doubt is deadlock unless the appellants give a notice which seems unlikely; while the demised premises remain empty it may be that the respondents cannot be ousted so long as they continue to pay this very small rent but it can scarcely be doubted that such a situation will lead to compromise.

Accordingly their Lordships will humbly advise Her Majesty that the appeal should be allowed and the cross-appeal dismissed and the judgment of Blandford, J. dismissing the suit with costs restored. The respondents must pay the appellants' costs of this appeal and cross-appeal and in the Court of Appeal for Eastern Africa.

Appeal allowed with costs; cross-appeal dismissed with costs to appellant.

For the appellant:

SW Templearn, QC and WF Stubbs
William A Crump & Son, London

For the respondents:

MP Solomon
TL Wilson & Co, London

Nsubuga v Uganda [1968] 1 EA 10 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	6 December 1967
Case Number:	890/1967 (3/68)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal procedure – Bond – Cash deposit – Forfeiture of – Proof required before money deposited in court may be forfeited in accordance with Criminal Procedure Code, s. 130 (1) (U.).*

Editor's Summary

On February 2, 1967, an accused deposited the sum of Shs. 500/- in the magistrates' court, Mengo, as security for his attendance for trial on July 25, 1967, at 2 p.m.; and he was released on bail. Sometime on July 25, the chief magistrate recorded that the accused was absent and a warrant for his arrest was issued at the request of the prosecutor. On August 8, 1967, the accused appeared before the court and stated that he had been present on July 25 at court but his name was not called. The prosecutor stated that the accused had been absent, but no evidence was called to prove this. The chief magistrate then ordered the Shs. 500/- to be forfeited. The accused appealed.

Held –

- (i) a mere statement by the prosecutor is not sufficient to satisfy the requirements of s. 130 (1) of the Criminal Procedure Code;
- (ii) evidence should have been given on oath;
- (iii) the procedure adopted by the magistrate was defective.

Appeal allowed

No cases referred to in judgment

Judgment

Sir Udo Udoma CJ: On February 14, 1967, the appellant, Joseph Nsubuga, was charged with theft by a person employed in the public service, contrary to s. 252 and punishable under s. 257 of the Penal Code. He appeared in court before the acting chief magistrate, magistrate's court, Mengo. He was admitted to bail on terms that he deposited the sum of Shs. 500/- in court as security for his appearance to face his trial in due course. The deposit was promptly paid and the appellant released on bail.

After due trial and at the conclusion of the evidence for the prosecution, the appellant was acquitted and discharged on the ground that there was no *prima facie* case made out against him to answer. That was on September 8, 1967. Prior to that decision, however, on August 8, 1967, in the course of the trial, the chief magistrate had ordered that the appellant's bail bond be estreated and the cash deposit of Shs. 500/- forfeited on the ground apparently that the appellant was absent when his case was called on for trial on July 25, 1967.

This appeal is against that order for the forfeiture of the cash deposit of Shs. 500/-. There are two grounds of appeal which are:

- (1) that the said order of forfeiture of the said cash bail of Shs. 500/- was against law and equity; and
- (2) that the learned chief magistrate erred in law and fact as he did not comply with s. 130 (1) of the Criminal Procedure Code.

At the hearing of the appeal, the point was taken by the court that the first ground of appeal was bad in law in that it contains no particulars as to why the order of forfeiture made by the learned chief magistrate was "against law and equity". It was not therein intimated the respect in which the order is said to have been against law and equity as required by the provisions of s. 327 (2) of the Criminal Procedure Code, the appeal having been filed on behalf of the appellant by an advocate. The ground was therefore struck off for non-compliance with that section of the Code.

On the second ground of appeal counsel for the appellant submitted that in estreating the bail bond and ordering the forfeiture of Shs. 500/- deposited in court as security for the appellant's bail, the learned chief magistrate had failed to comply with s. 130 (1) of the Criminal Procedure Code in that there was no sufficient evidence before the court to prove that the recognisance entered into by the appellant had been forfeited or that the appellant was not in court on July 25, 1967.

Counsel further contended that on the face of the record of proceedings, having regard to the statement made to the court by the appellant, the probability was that the appellant was in court that day; and that the learned chief magistrate was therefore wrong in law in ordering forfeiture without taking evidence on the issue. By the omission to take evidence, it was contended, the learned magistrate had deprived the appellant of the opportunity of being heard on oath as to whether or not he did attend court on the day in question.

It seems to me that the points made in his submission by counsel for the appellant on the second ground of appeal, in which submission counsel for the respondent had concurred when he indicated to the court that he was unable to support the order of the chief magistrate in this matter, is well taken. It is sound.

There is no doubt that the record of proceedings relevant to the matter in issue is incurably defective. It is apparent on the face of the proceedings that the

chief magistrate did not comply with the requirements of the provisions of s. 130 (1) of the Criminal Procedure Code.

The relevant proceedings as contained in the record of the court are as hereunder set forth:

“3.7.67. Accused present.

Nsimbambi for Pros.

Musaala for Accused.

Court: As I have now ceased to dispose of (Mr. Lubogo is on safari to Mubende) the proceedings are adjourned to 25.7.67, at 2 p.m. Bail of accused extended.

(sgd.) K. N. Maini, Ag. C.M.

25.7.67. Accused absent.

Agihugu: I ask for W/A to issue.

Court: W/A to issue.

(sgd.) D. L. K. Lubogo, C.M.

25.7.67.”

Then on 8.8.67, we have the following notes:

“8.8.67. Accused absent.

Auwo Pros.: The accused has been very difficult to trace. When the case was heard the witnesses turned up. The advocate did not know where accused was.

Accused: I was present but my case was not called.

Court: The file was called on 25.7.67, and the accused was not present and has not tried to come to court since then until he has been arrested.

There is no sufficient ground why his bail should not be forfeited.

Order: Deposit of Shs. 500/- has been forfeited.

The bond is cancelled.

Court: Fixed for hearing on 8.9.67.

Court: Accused remanded in custody to 22.8.67.

(sgd.) D. L. K. Lubogo, C.M.

8.8.67.”

It is to be observed that, when on 3.7.67 the case was adjourned, it was fixed for hearing on 25.7.67, at 2 p.m. Counsel for the appellant was then present. When, however, the case came up on 25.7.67, there is nothing on the face of the proceedings to show that it was called up for hearing at 2 p.m. All that appears is that the case was called on 25.7.67; that the appellant was absent; that the prosecutor then present was Agihugu instead of Nsimbambi, who had appeared for the prosecution on 3.7.67, and knew that the hearing was fixed for 2 p.m. and that it was Mr. Maini, acting chief magistrate, who had fixed the case

for 2 p.m. on 25.7.67, whereas the chief magistrate who ordered the issue of the warrant for the arrest of the appellant was Mr. D. L. K. Lubogo.

Furthermore when on 8.8.67 the appellant was apparently arrested and appeared before the chief magistrate, he had told the chief magistrate that he was present in court but that his case was not called on the date in question. From that statement it would appear that the appellant might have been present in court on 25.7.67; and it may well be that he was present in court at 2 p.m. whereas the case might have been called up for hearing in the morning.

It has been necessary to make these comments on the record of proceedings so as to show how important it was that, in order to avoid any kind of doubt or uncertainty and to prove to the satisfaction of the court that the deposit of Shs. 500/- was forfeitable, it was absolutely necessary that evidence should have been given on oath by the prosecutor. A mere statement by the prosecutor was not sufficient to satisfy the provisions of s. 130 (1) of the Criminal Procedure Code, which are as follows:

- “130. (1) Whenever it is proved to the satisfaction of a court by which a recognisance under this Code has been taken, or when the recognisance is for appearing before a court, to the satisfaction of such court, that such recognisance has been forfeited, the court shall record the grounds of such proof, and may call upon any person bound by such recognisance to pay the penalty thereof or to show cause why it should not be paid.”

Having regard to the above provisions, it is beyond the reach of argument that before any person who has entered into recognisance and who is bound by such recognisance to appear before a court can be called upon to pay the penalty prescribed in the said recognisance, or to show cause why such penalty should not be paid by him, it must have been proved by evidence to the satisfaction of the court and the ground of such proof must have been recorded in the record of the proceedings of the court:

1. That the recognisance was taken under the provisions of the Criminal Procedure Code; and
2. That such recognisance has been forfeited by reason of a default committed by the person concerned, for instance, by his failure to appear before the court in terms of his undertaking in the recognisance.

Without such proof it would be incompetent for the court to order the appearance of the person concerned before it to show cause why the penalty stipulated in the recognisance should not be enforced. Still less would the court be competent to order the forfeiture of any money deposited in court or stipulated in the recognisance as security for his appearance in accordance with the terms of the recognisance.

This section of the Criminal Procedure Code as worded is certainly not without difficulty in relation to the particular issue under consideration. Indeed the section is somewhat obscure and does not appear in part to make sense or to lend itself to easy interpretation. It is ambiguous in parts. In my view, the section has been poorly worded. For instance, what is meant by the expression “The court shall record the grounds of such proof”? Would it not have been sufficient to state simply: “The court shall record such proof”? Again, in the context of the present case, which only concerns failure to appear in court, how is the section to be read? Is it “Whenever it is proved to the satisfaction of the court by which a recognisance under this Code had been taken when the recognisance is for appearance before a court that such recognisance has been forfeited”? Or “Whenever it is proved when the recognisance is for appearance before a court, to the satisfaction of such court, that such a recognisance has been forfeited”?

Be that as it may, there is no doubt however that the learned chief magistrate did not comply with the provisions of s. 130 (1) of the Criminal Procedure Code before he issued his warrant of arrest and before he ordered the forfeiture of the appellant’s Shs. 500/-. The order was therefore irregular and illegal.

It was wrong in law and must be, and it is accordingly, set aside. This appeal therefore succeeds. It is allowed. It is ordered that the sum of Shs. 500/- if paid shall forthwith be refunded to the appellant.

Order accordingly.

For the appellant:

P Musaala

P Musaala, Kampala

For the respondent:

ST Mayindo (State Attorney, Uganda)

Director of Public Prosecutions, Uganda

Namyalo v Ratanshi
[1968] 1 EA 14 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	14 December 1967
Case Number:	908/1965 (5/68)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Negligence – Blind person – Extent of duty of care owed to blind man on the highway in Uganda by driver of a vehicle.

Editor's Summary

The plaintiff claimed damages for the death of her husband, who was run over by a lorry driven by the defendant's servant. The deceased was nearly blind. The driver of the lorry, going at about 40 m.p.h., saw the deceased about to cross the road, and hooted, whereupon the deceased started to cross the road, walking quickly. The driver took evasive action, but failed to miss him. The deceased was unaccompanied and there was nothing to indicate that he was nearly blind.

Held – the driver had no means of knowing that the deceased was nearly blind and the plaintiff had failed to prove negligence (*Haley v. London Electricity Board* (1) distinguished).

Suit dismissed.

Cases referred to in judgment:

(1) *Haley v. London Electricity Board*, [1963] 3 All E.R. 1003, C.A.; reversed on appeal, [1964] 3 All

E.R. 185, H.L.

Judgment

Sheridan J: The plaintiff claims damages for negligence arising out of an accident which occurred on May 20, 1965, when the defendant's Bedord lorry, registered number URH 940, hit and killed her husband as he was crossing the road at Bukoloto Trading Centre in Bugerere. The deceased, who was 65 years old and poorly nourished, died from fracture of the skull and brain haemorrhage. Despite his denials in the witness box, I accept as true the police statement of Ernesti Ncwampa, the deceased's nephew, made on May 21, 1965 (Exh. A) that the deceased "had been suffering for some time from his eyes and had not been seeing properly". It follows that I also reject the plaintiff's evidence that the deceased's eyesight was alright.

At the time of the accident – no time was given for it but it appears to have happened in daylight – the lorry was being driven by Ibrahim Ismail, the defendant's husband, from Kayunga to Kampala, loaded with produce for sale there.

Henry Lubega, a trader at Bukoloto, gave evidence that as he was sitting outside his coffee store, 50 yards before the petrol station at the bend in the road shown in the photographs (Exhs. B.1 to 6), he saw the lorry approaching at speed. The driver put out his hand and made a circular motion as if he intended to turn into the road leading to Kangulumira, on the left, but instead he went straight on towards the offside and knocked down the deceased who was crossing the road from the petrol station on the left. The witness thought that the left blinker was on. Here he is mistaken because I am satisfied on the evidence of Mr. T. F. de Souza, an insurance assessor, the photographs of the lorry which he took (Exhs. D.1 and 2) and the evidence of Ismail that this lorry never had any mechanical direction indicators. In cross-examination Lubega admitted that he could not see the petrol station – presumably the building – but only some of the pumps. I doubt if he was really an eye-witness to the accident.

Ismail gave evidence that he was travelling at 15 – 20 m.p.h. From a distance of 50 ft. he saw an old man about to cross the road. He hooted, whereupon the old man started to walk quickly across the road. He took avoiding action by turning to the offside, but the man knocked against the lorry. Mr. de Souza saw a dent on the nearside front side section of the lorry which would be the point of impact. He drew a sketch plan (Exh. E) from police information, which shows that the deceased was hit 12 ft. 8 ins. from the nearside of the road and 11 ft. 2 ins. from the offside. The lorry stopped 71 ft. 4 ins. beyond this spot, near the offside of the road. The Highway Code in England allows a stopping distance of 40 ft. for a vehicle travelling at 20 m.p.h. in perfect conditions, but adds that vehicles other than private cars may need twice these distances: Bingham's Digest of Motor Claims Cases (5th Edn.), p. 42. This would indicate that Ismail's estimate of his speed was not far out. I accept his evidence that there was no need for him to make any signal. Even if he had done so that would have been all the more reason for the deceased to wait before crossing the road, to avoid being run over; which suggests that due to failing eyesight he did not properly see the approaching lorry, and misinterpreted the hooting as to its position on the road.

The question then arises what duty did the driver owe to this nearly blind man? Counsel for the defendant, relied on *Haley v. London Electricity Board* ([1963] 3 All E.R. 1003, C.A.). The headnote reads:

"The defendants, by their servants, dug in a pavement a trench parallel with the road. This they did under statutory authority, conferred by s. 6 of the Gasworks Clauses Act 1847, by s. 10 of which the condition of their exemption from nuisance was that they should cause the pavement dug up to be fenced and guarded. A duty on the defendants to take reasonable care to prevent damage to the public thus remained throughout. In order that the trench might be adequately fenced and guarded they put a punner hammer across the pavement to stop pedestrians from walking along it. The handle end of the punner hammer rested on some railings two feet from the ground, while the hammer end rested on the pavement about one foot from the outer edge. The plaintiff, who was blind, while on his way unaccompanied to work in the morning, missed the sloping punner hammer with his stick, tripped over it, and fell and received injuries. The place was not one where there was a particular reason to expect blind persons to be. In an action against the defendants for negligence,

Held: the defendants were not liable, because the guard constituted by the punner hammer was an adequate and reasonable guard for the protection of an ordinary member of the public (see p. 1006, letter A, p. 1007, letter A, and p. 1008, letter E, post), and, in the circumstances of the case, the defendants were under no duty to take special precautions to protect blind persons."

Lord Denning, M.R., said ([1963] 3 All E.R. at p. 1005):

“But the defendants do not have to cater for the man who walks with his head in the air or does not look where he is going. He is such an exceptional person that they do not need to provide for him. If he runs into a fence or guard, it cannot be helped. It is not their fault. Likewise, I am afraid I must say, the defendants do not have to provide for the blind, at any rate in places where they have no particular reason to expect blind persons to be. It would be too great a tax on the ordinary business of life if special precautions had to be taken to protect the blind”.

However, in *Haley v. London Electricity Board* ([1964] 3 All E.R. 185), the House of Lords overruled the Court of Appeal and held that the use of the pavement by blind persons was reasonably foreseeable and that the punner hammer was not an adequate or sufficient warning for a blind person who was taking the usual precautions by use of his stick and that he was entitled to damages at common law for negligence.

I think that decision must be distinguished from the case of a nearly blind man in Uganda, crossing the road unaccompanied and without the use of a stick. In England a driver would be alerted on seeing a person tapping his way with a white stick or led by a guide dog. It is the custom in East Africa for a blind person to go about accompanied by a member of the family, often a child. Here the deceased was alone. The driver was unable to take any of the precautions referred to in *Haley's* case (*supra*) as he had no means of knowing that the deceased was blind; and of course that decision was in relation to a pavement and not to a highway. The plaintiff has failed to prove negligence on the part of the defendant.

In case I am found to be wrong on the question of liability I will quantify the damages I would otherwise have awarded. The plaintiff is forty years old. Although she has two dependent children aged ten and nine, she is suing for her own benefit only, as appears from her advocate's letter dated February 22, 1966, in reply to a request for further and better particulars (Exhs. C.1 and 2). There is no claim for loss of expectation of life.

In evidence the plaintiff stated that their joint annual income was Shs. 1,000/- – in farming their kibanja. She still has it, but says it is overgrown. I would fix her annual dependency at Shs. 500/-, and allowing the deceased a five year expectation of life I would have awarded Shs. 2,500/- damages.

As it is the suit is dismissed with costs.

Suit dismissed.

For the plaintiff:

L Sebalu

Sebalu & Co, Kampala

For the defendant:

RE Hunt

RE Hunt, Kampala

Division: Court of Appeal at Nairobi
Date of judgment: 8 December 1967
Case Number: 19/1967 (6/68)
Before: Sir Charles Newbold P, Duffus and Law JJA
Sourced by: LawAfrica
Appeal from: High Court of Kenya – Sherrin, J

[1] Contract – Time – When time is of the essence in a case of delivery of goods – Furniture ordered by purchaser of unfurnished house – Waiver by extension.

Editor's Summary

The plaintiff claimed a sum of money in respect of furniture ordered by the defendant who (to the knowledge of the plaintiff) needed it to furnish a house purchased by him from which the existing furniture was to be removed by April 30, 1966. The delivery date as stipulated by the defendant was originally April 30, 1966 but this was subsequently extended by the defendant giving two or three days' grace. On May 10, 1966 the defendant informed the plaintiff's son in the plaintiff's shop that the order for the furniture was cancelled. The plaintiff nevertheless made delivery on May 12, 1966, in spite of the protests of the defendant, who put the furniture in his store. The trial judge held that the delivery date as extended was of the essence of the contract and dismissed the plaintiff's claim. On appeal by the plaintiff it was contended that: (i) the original delivery date of April 30 was not of the essence; (ii) and, if it was, the extension of two or three days' grace rendered time no longer of the essence.

Held –

- (i) there was sufficient evidence of intention by both parties to make time of the essence;
- (ii) in the circumstances the extension or extensions of time did not cease to make time of delivery of the essence and the defendant was entitled to cancel the contract when he did.

Appeal dismissed with costs.

Observations of Newbold, P., in *Nurdin Bandali v. Lombank Tanganyika Ltd.* (1) explained.

Case referred to:

(1) *Nurdin Bandali v. Lombank Tanganyika Ltd.*, [1963] E.A. 304.

December 8, 1967. The following considered judgments were read.

Judgment

Law JA: This is an appeal by the plaintiff from a judgment of the High Court in a suit in which the plaintiff had claimed a total of Shs. 7,650/- in respect of furniture ordered by the defendant, part of which was delivered to but rejected by the defendant and the balance rejected before delivery. The grounds of rejection were that it was a term of the contract between the parties that the furniture should be

manufactured and delivered to the defendant on or before April 30, 1966, and that time was in this respect expressly made of the essence of the contract, and delivery not having been made by the date stipulated the defendant was entitled to reject the goods. The learned trial judge held that time was of the essence and dismissed the plaintiff's claim except for an item of 1,300/- which he found to be due in respect of built-in cupboards made by the plaintiff for the defendant; and he gave judgment for the defendant for

Shs. 700/- being the balance of the deposit of Shs. 2,000/- paid by the defendant to the plaintiff under the contract for the manufacture of furniture after deduction of the Shs. 1,300/- to which the plaintiff was entitled for the built-in cupboards.

The facts of the case were as follows. The defendant bought a house which he had been occupying as a tenant, and his former landlord was to remove the furniture by the end of April, 1966. It was therefore necessary for the plaintiff to acquire furniture of his own by April 30. He and his wife accordingly visited the plaintiff's son, who manages his father's furniture shop, and selected from a catalogue certain items of furniture to the value of Shs. 7,650/- for manufacture and delivery by April 30. The furniture was not ready on that date, and the defendant allowed an extension of time. This extension was "for a couple of days' grace", according to the defendant, and "for two or three days' grace" according to his wife. It appears that two such extensions were granted, one on April 30, and one on May 2 or May 3. On May 10 the furniture still had not been delivered, and the defendant and his wife went to the plaintiff's shop, where they saw another son of the plaintiff's and told him that they had cancelled the contract. On the evening of May 12 the plaintiff delivered part of the furniture, which he left at the defendant's house, in spite of the defendant's protests. This furniture has since been lying in the defendant's store. The defendant made it clear that he was not accepting delivery either of the furniture brought to his house on May 12, or of the balance. The only question in this appeal is whether, in the circumstances recited above, the defendant was entitled to reject the furniture ordered by him.

The principal grounds of appeal are, firstly, that the judge erred in finding that the stipulated delivery date was of the essence of the contract, and secondly, that even if it was of the essence, it ceased to be so by waiver and never again became of the essence in the absence of reasonable notice to that effect.

As to the first point, the judge found that the agreed delivery date, April 30, was of the essence of the contract. I quote from his judgment:

"I have to consider whether it was a term of the contract that the goods should be delivered by the end of April. I think it was. Messrs. Khanna and Company say 'No doubt our clients had promised delivery by the end of April'. It seems to me that April 30 was made something more than a probable delivery date. I cannot see, if a man requires something on or before a certain date, how he can do much more than obtain a promise from the vendor to deliver it by then. A lawyer might lay down that the time was of the essence of the contract, but an ordinary man in the street would never have heard of the term. It must be possible in Nairobi to tie a tradesman down to delivery on a certain day, otherwise once you give an order for anything to be done you would be entirely in the hands of the person with whom you contracted and you would have no remedies for delay."

No doubt the stipulation that the furniture would be ready by the end of April was a term of contract, but was it clear to the parties that it was to be of the essence, in other words that if the goods were not ready for delivery on April 30, the defendant would have the right to rescind the contract and refuse to take delivery? The defendant's own evidence is not to this effect. He said:

"The time was fixed at April 30. Nothing was said specifically as to what was to happen if it was not ready then. He assured me that it would be ready on April 30."

Although time was not expressed to be of the essence of this contract, there are indications that it was intended to be so. The defendant had made it clear that he must have the furniture by the end of April, because his former landlord

was going to remove the furniture being used up till then and because he was expecting his children to come from Uganda and stay with him at the end of April. That the furniture was urgently required seems to have been appreciated by the plaintiff's son, who acknowledged in evidence that the defendant's need "was more than normal", and this is borne out by the letter from the defendant's advocates, dated May 23, in which they say "no doubt our clients had promised delivery by the end of April". Although I have some doubts as to whether the parties intended delivery of the furniture by April 30 to be of the essence of the contract, there is evidence on both sides indicating that this was their intention, and it has not been shown to my satisfaction that the judge was wrong in holding that time was of the essence in this case.

It remains to be considered whether, the defendant having waived his right to rescind by granting extensions after April 30, time ever became of the essence again so as to enable the defendant to treat the contract as cancelled on May 10. The trial judge dealt with this aspect of the case in these words:

"The defendant had allowed the plaintiff various extensions of time, but I cannot see why he should go on doing so. He had no means of knowing when the furniture would be finished and, in my opinion, was entitled to put an end to the contract, as he did."

If the judge was intending to say that a party to a contract, in which time is of the essence, who has waived his right to rescind the contract upon the expiry of the stipulated time, can thereafter unilaterally reintroduce time as being of the essence without notice, then in my opinion he misdirected himself. The law on the subject was expressed in the following terms by Newbold, J.A. (as he then was) in *Nurdin Bandali v. Lombank Tanganyika Ltd.* ([1963] E.A. at p. 316):

"It may well be that where a provision in a contract as to time has been waived by an amending contract it would not have been open to one of the parties to the contract unilaterally to reintroduce it in its original form. But where one party to a contract is in default for an unreasonable time it is always open to the other party to serve a notice requiring completion within a reasonable time; and such a notice, if in the circumstances it is reasonable, in effect unilaterally makes, or reintroduces time as of the essence to the contract."

Each extension of time granted by the defendant in this case constituted a new contract, the consideration of the defendant's part being his desire to take delivery of the furniture, although the agreed date for delivery stipulated in the original contract had passed, and the consideration on the plaintiff's part being his need for more time in which to make delivery. If there had been one extension for an indefinite period, there would be no difficulty in this case. The defendant could only have reintroduced time as being of the essence by giving reasonable notice to that effect. But this does not seem to have been the position here. The judge has found that the defendant allowed the plaintiff "various extensions of time". It is unfortunate that this finding was not more specific, so that the precise nature of these amending contracts could be established. The evidence in support of the finding that various extensions of time were granted is that of the defendant and his wife, that one or more extensions of "a couple of days' grace" were granted at the request of the plaintiff's son. The judge seems to have accepted this evidence, the effect of which is, in my opinion, that there was no general waiver by the defendant of the stipulation as to time, in which case the plaintiff would have been entitled to reasonable notice that time was again to be made of the essence, but a restricted waiver in each case for a period of two or three days, at the expiry of which the defendant's right to rescind the

original contract and reject the goods automatically revived. If this was the position, then when the defendant informed the plaintiff's son on May 10 that the contract was cancelled, he was not unilaterally reintroducing time as being of the essence, without notice, but merely stating the fact that, the last agreed extension of time having expired, he was not prepared to allow any further time within which delivery could be made.

For these reasons, although I am not satisfied that the judge correctly directed himself on the points at issue, I think he came to a correct conclusion, and I would dismiss this appeal.

Sir Charles Newbold P: The facts relevant to this appeal are set out in the judgment of law, J.A. which I have had the advantage of reading in draft. Two questions arise on the appeal. The first is whether time was of the essence of the original contract in respect of the delivery of the furniture? The second is, if so, was the position changed as a result of the extension of the date for delivery?

As regards the first question, where, as in this case, it is not an express term of the contract that if a requirement of the contract is not complied with on the specified date the contract is to cease to have effect, a court may nevertheless come to the conclusion that in the circumstances such a term should be implied. In a commercial contract where goods are to be delivered on a specified date for the purposes of the purchaser's business, the specified date for delivery would normally be regarded as of the essence of the contract. Such would not normally be the position in the case of goods purchased for domestic purposes, but the particular circumstances may result in the specified date for delivery being regarded as of the essence of the contract. In this case the fact that the plaintiff was told that the defendant was moving into an unfurnished house on the date specified for delivery of the furniture, together with the contemporaneous and subsequent conduct of the parties and the correspondence between them, were matters from which the trial judge could draw the inference, which he did, that it was an implied term of the contract between the parties that the date for delivery of the furniture was of the essence of the contract. This court is in as good a position as the trial judge to draw or refuse to draw inferences of such a nature, but nothing that has been urged on behalf of the plaintiff on appeal persuades me that the judge drew the wrong inference.

As regards the second question, the findings of the trial judge on the precise terms of the amending contract granting an extension of the date for delivery are very vague. This may be because it was never the plaintiff's case that even if time was originally of the essence of the contract nevertheless the parties had agreed to amend the contract so as to enable the plaintiff to deliver the furniture within a reasonable time and the delivery or tender of the furniture on or about May 12 was a compliance with the amended contract. Where time in relation to the delivery of goods is originally of the essence of a contract and a short extension of the date for delivery is agreed to by the parties then normally delivery on the new date would also be of the essence of the contract. My words in *Nurdin v. Lombank* ([1963] E.A. at p. 316) that

“... where a provision in a contract as to time has been waived by an amending contract it would not be open to one of the parties to the contract unilaterally to re-introduce it in its original form”,

relate, as can be seen from the context in which I used the words, to the position where the amended contract results in time ceasing to be of the essence of the contract and not to the position where the amended contract merely provides a new date for delivery. It is quite clear from the general circumstances in

which the defendant agreed to accept the furniture on a date subsequent to the original date that he only did so on the basis that if delivery was not given on the new date then the contract would cease to have effect. It would seem from the evidence that one, and possibly two, extensions were given. It is not clear what was the final extended date but I am satisfied that it was prior to the date on which the furniture was ready for delivery. The plaintiff had, by his action in failing to deliver the furniture on the last date agreed to by the parties, repudiated the contract and the act of the defendant in subsequently informing the plaintiff that the contract between them was cancelled was merely an intimation by the defendant to the plaintiff that the repudiation of the contract by the plaintiff was accepted by the defendant with the result that the contract was rescinded. I have arrived at this conclusion on the basis that the pleadings and the conduct of the case enabled the plaintiff to urge on appeal that under the amended contract time was no longer of the essence of the contract. I have, however, grave doubts whether such a position is open to the plaintiff, but it is unnecessary for me to arrive at a conclusion on the matter having regard to my view of the position in any event.

For these reasons I agree with Law, J.A. that the appeal should be dismissed. It is accordingly dismissed with costs.

Duffus JA: I have had the advantage of reading the judgments of Law, J.A. and Sir Charles Newbold, P. in draft form and I agree that for the reasons therein stated by my Lordships that this appeal be dismissed with costs.

Appeal dismissed.

For the appellant:

DN Khanna

Khanna & Co, Nairobi

For the respondent:

Satish Gautama and Aziz Mohamed

ASG Kassam & Co, Nairobi

Embu Public Road Services Ltd v Riimi
[1968] 1 EA 22 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	10 November 1967
Case Number:	23/1967 (7/68)
Before:	Sir Charles Newbold P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Madan, J

[1] *Negligence – Emergency – Spring breaking on bus – What standard of care required from driver.*

[2] *Negligence – Res Ipsa Loquitur – Motor accident – Bus overturns on straight road – Onus on owner and driver to disprove negligence – Main spring breaking – Whether onus discharged – Observations on extent of onus.*

Editor's Summary

The husband of the respondent was killed while travelling as a passenger in a bus which overturned after one of its main springs broke while it was travelling along a straight stretch of road. The respondent relied on *res ipsa loquitur*. The evidence, including expert evidence, was conflicting but it appeared that there was an appreciable time between the spring breaking and the bus overturning. The judge, preferring the expert evidence for the plaintiff, found that it should have been possible for the driver of the bus to control it in spite of the sudden breaking of the spring; the fact that he did not showed that he was inattentive or negligent for a moment; and that therefore he had not proved that the accident was not caused by his negligence and had not displaced the *prima facie* presumption of negligence which arose from the circumstances in which the accident occurred. He gave judgment for the respondent. On appeal:

Held –

- (i) where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show “that there was a probable cause of the accident which does not connote negligence” or “that the explanation for the accident was consistent only with an absence of negligence” (*Msuri Muhhiddin v. Nazzor Bin Seif* (1) and *Menezes v. Stylianides Ltd.* (2) followed);
- (ii) while the driver had to meet a sudden emergency and what was required of him was not perfect action, nevertheless, on the evidence it had not been shown that the emergency was so sudden that he could not have taken that amount of corrective action which should be expected of a competent driver of a public service vehicle.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Msuri Muhhiddin v. Nazzor Bin Seif*, [1960] E.A. 201.
- (2) *Menezes v. Stylianides Ltd.* (Civil Appeal No. 46 of 1962, not reported).
- (3) *Barkway v. South Wales Transport Co. Ltd.*, [1950] 1 All E.R. 392.
- (4) *Hunter v. Wright*, [1938] 2 All E.R. 621.
- (5) *Laurie v. Raglan Building Co. Ltd.*, [1941] 3 All E.R. 332.
- (6) *Stoomvaart Maatschappij Nederland v. P. & O. Navigation Co.* (1880), 5 App. Cas. 876.

November 10, 1967. The following judgments were delivered *ex tempore*.

Judgment

Sir Charles Newbold P: This is an appeal by a common carrier against a decision of the High Court awarding damages to the widow of a passenger on a bus belonging to the common carrier in respect of the death of that passenger while being carried in the bus. The action, in so far as is relevant to the appeal, was based upon the negligence of the common carrier, whom I shall refer to as the defendant. That negligence was in the pleadings stated to arise in two ways; first, by negligence in the maintenance of the bus, whereby the condition of the bus was such that an accident of the type which occurred was likely to occur; and, secondly, by negligence in the driving of the bus, whereby the driver did not control the bus in the manner in which it was his duty to do so. The judge heard the evidence in the case and he gave judgment in favour of the plaintiff for a specified sum of damages. In that judgment he rejected any question of negligence based upon the condition of the bus and relied for his decision solely upon a finding of negligence on the part of the driver of the bus. From that decision the defendant has appealed and the plaintiff has cross-appealed with a view to supporting a decision of the judge on the first ground of negligence, that is that the bus was maintained in a negligent condition.

The facts, very briefly, are that the husband of the plaintiff was a passenger in this bus proceeding along a country road. At some stage when the bus was proceeding along a straight bit of the road, at a speed which was agreed as not being excessive and which has been accepted by everyone as between 25 and 30 m.p.h., the main spring of the bus broke suddenly and some time thereafter, some short time thereafter, the bus left the road, overturned, and as a result a passenger died. The only real dispute on the facts, in so far as the driving is concerned, is the period of time between the breaking of the spring and when the bus overturned. The defendant called an expert witness, Mr. Barber, whose evidence, generally, was to the effect that the spring had broken suddenly without any warning to the driver and that this would cause a loss of control which would lead directly to the overturning of the bus. The defendant also called the driver of the bus whose evidence, generally, was to the effect that faced with this sudden and, to him, unprecedented emergency he tried to keep the bus on the road and when this did not appear to be successful he applied his brakes and the bus overturned immediately. It is not quite clear from the driver how long was the period between the breaking of the spring and the overturning of the bus, but the impression I have received from his evidence was that it was a relatively short period, much shorter than is suggested on the part of the plaintiff on this appeal. The plaintiff, on the other hand, dealing with this aspect of the appeal, called an expert witness, who, to all appearances, is just as well qualified although his qualifications have come under a mild attack and whose evidence is, in broad outline, first that even if the spring had broken suddenly, nevertheless, at the speed at which it was accepted the bus was going, and in the conditions which were accepted to be existing at that time, the driver should have been able to control the vehicle; and, secondly, that the cause of the accident was not directly the breaking of the spring but directly the failure of the driver to do what a reasonably competent driver should have done in the circumstances. In addition, the plaintiff called a policeman who was actually a passenger in the bus at the time. The effect, generally, of the policeman's evidence, as I read it, is that there was a fairly appreciable period between the breaking of the spring and the overturning of the bus and in that appreciable period the bus travelled a distance which counsel for the respondent has submitted was 100 yards, and which the witness himself stated to be about 150 yards, but which counsel for the appellant submitted was not as long as that. What is, I think, clear from the evidence of the policeman is that there was an appreciable period between the crack, which must, I consider, be taken to indicate

the moment at which the spring broke, and the moment at which the bus overturned. So long a period, in fact, as I read his evidence, though it is not particularly clear, that the policeman had time to consider, if he did not actually take, action in relation to the manner in which the bus was being driven.

Now on those facts the doctrine of *res ipsa loquitur* has been relied on by the plaintiff. The action, as I say, was founded on negligence, and it is always for the plaintiff to prove negligence. He does so by proving that the action taken by the defendant in relation to the circumstances in which the action was taken did not exhibit that standard of care which it should have done. Of course, there must first be a duty of care on the part of the person who is sought to be made liable; and this duty is clearly owed in this case by the defendant to the passengers in the bus. The doctrine of *res ipsa loquitur* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances, does not have to show any specific negligence, he merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only reasonable inference, that the only reason for the accident must therefore be the negligence of the defendant. That is what the plaintiff in this case sought to do. He stated that here was a bus proceeding along a perfectly straight road and it overturned; therefore, on those facts, there would be assumed to be some negligence unless an explanation was given. It would seem that before the trial judge the defendant accepted that such was the position and accepted that the provisional onus had shifted to him to give an explanation which displaced negligence, as he undertook the burden of leading evidence to show that the accident had happened in circumstances which displaced the *prima facie* presumption resulting from the application of the doctrine of *res ipsa loquitur*. In essence, what he has attempted to show is what is sometimes described as an unavoidable accident. He has given an explanation which, he submits, shows that the accident happened through causes beyond his control and for which he was not responsible and that therefore he had not failed in his duty of due care.

The judge, having to choose between these two expert witnesses and the two eye-witnesses, that is the driver and the policeman, eventually came to the conclusion that the driver had been negligent in what he described as the moment following the breaking of the spring and before the bus had overturned. What I understood the judge to have found was that, accepting the evidence of the expert for the plaintiff, it should have been possible for the driver to control the bus in spite of the sudden breaking of the main spring; and the fact that he did not shows that he was inattentive or negligent for a moment and that therefore he had not proved that the accident was not caused through his negligence. Towards the end of the judgment the judge said this:

“The breaking of the spring may have been an act of God but the act of God did not concur in the overturning of the bus. What I have called negligence Mr. Blakeman described as inattentiveness. It will be remembered that Mr. Blakeman said it is not feasible that the front off-side main leaf broke, the vehicle pulled to the right, and the vehicle overturned in the absence of excessive speed. He also said that a driver should have been able to control it in these circumstances and at 20 – 25 m.p.h. the vehicle should have been fully controllable even with twenty-seven passengers on board. The parties are agreed that the bus was travelling at a normal speed when the accident happened,”

I read that finding of the trial judge as a conclusion that he accepted the evidence of Mr. Blakeman that a reasonably competent driver should have been able to control the bus even though a spring broke suddenly; and that, as he had failed to do so and had given no other explanation for his failure other than the breaking of the spring, therefore the explanation given by the defendant for the accident did not displace the *prima facie* presumption of negligence which arose from the circumstances in which this accident occurred.

Counsel for the appellant, who was the defendant, has sought to show that some of the findings of the trial judge are not consistent with the evidence. To my mind he has succeeded in a number of respects. I do not propose, however, to go into all the various aspects in which he has succeeded because in these accident cases I am convinced that a court, particularly a Court of Appeal, has got to look at the position broadly. The first thing is to make quite sure what the law is. A number of English cases have been cited to us on the position, but I prefer to refer to only one of them and to take the law as set out in the judgments of this court in two cases. The first of those cases is *Msuri Muhhiddin v. Nazzor Bin Seif* ([1960] E.A. 201). In that case also the question of the doctrine of *res ipsa loquitur* arose and the question of what the defendant had to show in order to avoid liability on a presumption of negligence on his part which arose from the circumstances of the accident. Sir Alistair Forbes, V.-P., delivering his judgment with which the other members agreed, said *ibid.* at p. 207):

“In the light of the dicta set out above I accept [counsel for the respondents’] propositions that the respondents can avoid liability if they can show either that there was no negligence on their part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence on their part; or that the accident was due to circumstances not within their control.”

In a subsequent case, *Menezes v. Stylianides Ltd.* (2), which, so far as I am aware was not reported, I said in my judgment, with which the members of the court agreed:

“ ‘These circumstances’ – I was there dealing with the circumstances in the particular case – ‘raise a strong inference of negligence on the part of the driver of the lorry in the absence of an explanation showing that the accident happened without negligence on his part (see *Barkway v. South Wales Transport Co., Ltd.* ([1950] 1 All E.R. 392). The respondent has sought to explain the accident by saying that it occurred by reason of a skid. But a skid is something which may occur either by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence (as in *Hunter v. Wright* ([1938] 2 All E.R. 621)) the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident (see *Laurie’s case* ([1941] 3 All E.R. 332)). In other words, the respondent, by saying that the lorry left the road by reason of a skid has neither shown that there was no negligence on the part of the driver of the lorry nor given an explanation which is consistent only with an absence of negligence, with the result that the inference of negligence from the circumstances of the accident has not been displaced.”

As I understand the law as set out by these two judgments of this court, where the circumstances of the accident give rise to the inference of negligence then the defendant, in order to escape liability, has to show, in the words of Sir Alistair Forbes, “that there was a probable cause of the accident which does not connote negligence” or in the words which I have previously used “that the explanation for the accident was consistent only with an absence of

negligence". The essential point in this case, therefore, is a question of fact, that is, whether the explanation given by the defendant shows that the probable cause of the accident was not due to his negligence or that it was consistent only with the absence of negligence. In determining that issue of fact I think it right to bear in mind what Lord Blackburn said in *Stoomvaart Maatschappij Nederland v. P. & O. Navigation Co.* ((1880), 5 App. Cas. 876). In his judgment Lord Blackburn said (ibid. at p. 891):

"... And I agree that when a man is suddenly and without warning thrown into a critical position, due allowance should be made for this, but not too much."

I think it undisputed on the facts of this case that the driver of this bus, by the sudden breaking of a spring, was thrown suddenly into a position of emergency. Counsel for the appellant has very forcefully, and I think correctly, submitted the duty on the driver is not to drive perfectly but to show that standard of care which a competent driver of a bus should show in these circumstances. This issue of fact I found at one time difficult to determine. At an earlier stage of this hearing I tended to the view that in the circumstances the driver had not been shown to have departed from the standard of care which he should have shown in all the circumstances. As the case developed, however, and particularly having regard to the evidence of the policeman who was a passenger, it has become clear to me that while the period of time between the breaking of the spring and the overturning of the bus was relatively short, nevertheless it was long enough to enable a competent driver, if he had been doing all that he should have done and paying the attention which he should have paid, to have taken the necessary action to prevent the bus from overturning and to bring the bus to a standstill before he did. It may be that this is what the judge meant in referring to the moment of negligence or inattention. I would prefer to put it on the basis that while undoubtedly the driver had to meet a sudden emergency and while undoubtedly what was required to him was not perfect action, nevertheless on the evidence it has not been shown that the emergency was so sudden that he could not have taken that amount of corrective action which should be expected of a competent driver of a public service vehicle. This is supported by the evidence of the expert for the plaintiff who, in effect, said he thought it inconceivable that a competent driver could not, if he had been driving competently and paying attention, have taken some corrective action following a sudden emergency which would have prevented the accident. This being so, and allowing for the difficulty in which the driver of the bus found himself as a result of the sudden breaking, I somewhat hesitantly have come to the conclusion that the explanation given by the defendant for the accident does not show either that the probable cause of the accident was not due to his negligence or that his explanation is consistent only with an absence of negligence. As I say, I consider the facts did not disclose that he could not have taken such action as a reasonably competent driver should in the circumstances have taken. For these reasons I agree with the decision of the trial judge on the question of liability. It may be that my reasons are precisely the same although expressed in different language. I would thus dismiss the appeal.

As regard the cross-appeal, this was related to the desire on the part of the respondent, that is the plaintiff in the case, to support the finding of the judge on the ground of negligence in the maintenance of the vehicle. There was undoubtedly evidence before the court which, if accepted, would not lead to that conclusion. Indeed, the judge so stated. But the judge, for the reasons which he gave, did not accept that evidence. It may be that the judge was a little hasty in rejecting the evidence; but whether that be so or not, I, certainly as a judge of appeal, would not be prepared to say that the trial judge was

wrong in rejecting the evidence of Mr. Daniels. Therefore, in my view, the cross-appeal, so far as it is still before us, should also be dismissed.

Spry JA: I agree with the judgment which has been delivered by my lord President and there is very little that I need to add.

The evidence of Mr. Blakeman which the learned trial judge accepted was that the breaking of a leaf in the spring should not result in a vehicle of this sort overturning. It is common ground that the road was straight and the surface good for a murram road and there was no other vehicle involved. The expert witness for the appellant company, Mr. Barber, never gave evidence contrary to this evidence although he did say in relation to this accident that the breaking of the leaf brought about “the initial loss of control leading to overturning” and he also said that no human agency could have prevented the accident although I think what he meant to say was that no human agency could have prevented the leaf from breaking. The evidence of the driver of the bus is not very clear and it is sometimes self-contradictory; this applies also to the evidence of the only other eye-witness, a policeman who was a passenger in the bus. But speaking for myself I am left with a clear impression from this evidence that there was sufficient time between the breaking of the spring and the overturning of the bus for a reasonably skilled driver to have taken some action to bring the vehicle under control. If, as the policeman said, the bus travelled 100 or 150 yards after the leaf broke, and this is not directly contradicted by the driver, the bus should substantially have lost speed before the driver applied his brakes, which he says he did not do immediately. Indeed, it does not appear from the driver’s evidence that he lost control immediately and this highlights the presumption of negligence. This is not a case where in the crisis of the moment the driver, faced with alternative courses of action, takes the wrong one. It is not suggested that the action which the driver says he took was incorrect. But we are left with an accident where the circumstances strongly suggest negligence, a suggestion which is not, to my mind, displaced by the driver’s evidence or by any other evidence.

I agree with my lord President that the appeal should be dismissed.

I am not without sympathy for the argument of counsel for the respondent on the cross-appeal, but after some hesitation I have concluded that it would not be right to interfere with the findings of the learned trial judge on the evidence, which was contradictory and in many respects very unsatisfactory. I therefore agree that the cross-appeal should also be dismissed.

Law JA: Although the driver of the bus was faced with an emergency, and although the evidence of negligence is not very strong, it would appear that the driver had a short but appreciable period of time in which to bring the bus under control after the rupture of the spring, during which time the bus travelled a distance of 100 yards or so. The judge accepted Mr. Blakeman’s evidence that the driver should have been able to control the bus, in these circumstances, and that a bus being driven at a moderate speed on a straight and dry road, should not overturn on the front spring breaking. The judge was unable to accept the opinion of Mr. Barber, the appellant’s expert, that no human agency could have prevented the accident, a proposition which if intended to be general would involve the corollary that whenever a main leaf in a front off-side spring breaks on a bus which is being driven at a reasonable speed on a good road surface, that bus will overturn. I see no reason to differ from the judge’s conclusion which is to the effect that the appellant’s driver fell short on this occasion of the standard of care expected from a reasonably competent driver, and I would also dismiss this appeal.

I am unable to agree with the second ground in the cross-appeal, that the judge erred in not accepting

the evidence of Mr. Daniels. The judge gave sound

reasons for rejecting that evidence and I see no reason to come to a different conclusion in this respect. I consider that the cross-appeal was necessarily and properly brought, having regard to the first three grounds of appeal which were not abandoned until this morning, and although the second ground in the cross-appeal has failed, the respondent has succeeded on the first and most important ground and should, in my view, have the costs involved in the cross-appeal.

Appeal dismissed with costs. Cross-appeal dismissed with no order as to costs.

For the appellant:

JM Nazareth, QC and JK Winayak
JK Winayak & Co, Nairobi

For the respondent:

CW Salter, QC and MK Bhandari
Bhandari and Bhandari, Nairobi

Saldanha and others v Bhailal & Co and others
[1968] 1 EA 28 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	17 November 1967
Case Number:	555/1955 (8/68)
Before:	Dalton J
Sourced by:	LawAfrica

[1] *Practice – Inherent jurisdiction – Dismissal of suit for want of prosecution – Whether Court has inherent power to order – Civil Procedure Act, s. 97 (K.).*

[2] *Practice – Want of prosecution – Dismissal of suit for – Whether Court has inherent power to order, apart from Civil Procedure (Revised) Rules 1948, O. 16, rr. 5 and 6 and O. 9, r. 16 – Civil Procedure Act, s. 97 (K.).*

Editor's Summary

This action was filed in June, 1955, complaining of events as far back as 1951 and concerning activities in 1952 and 1953. It was listed for hearing in January, 1956, but was taken out of the list by consent; and again in 1957, 1959, 1960 and September, 1961. Nothing then happened until January 6, 1964, when it was again listed for hearing in May, 1964. In May, 1964, it was adjourned on the application of the plaintiffs. In January, 1965, a new hearing date was fixed for June, 1965, but the action was again adjourned by consent. An unsuccessful attempt was made in May, 1967, to fix another hearing date.

Finally in October, 1967, the defendants made this application to have the action dismissed for want of prosecution. The application was made under O. 16, rr. 5 and 6 of the Civil Procedure (Revised) Rules 1948 as well as under s. 97 of the Civil Procedure Act; but at the hearing the applicants relied only on the inherent power of the Court under s. 97.

Held – there being specific provisions in O. 16 and O. 9, r. 16 of the Civil Procedure (Revised) Rules 1948 for the dismissal of suits for want of prosecution there is no inherent power to dismiss a suit for want of prosecution (*Ahmed Hassam Malji v. Shirinbai Jadavji* (3) applied).

Application dismissed.

Cases referred to in judgment:

(1) *Fitzpatrick v. Batger & Co. Ltd.*, [1967] 2 All E.R. 657.

(2) *Reggentin v. Beecholme Bakeries Ltd.* (1967), 111 Sol. Jo. 216.

(3) *Ahmed Hassan Malji v. Shirinbai Jadavji*, [1963] E.A. 217.

(4) *Ajodhya v. Mussamat Phal Kuer* (1922), A.I.R. Pat. 479.

Judgment

Dalton J: This is an application under s. 97 of the Civil Procedure Act and O. 16, rr. 5 and 6 of the Civil Procedure (Revised) Rules 1948, by the surviving partners in the defendant company and by the second and third defendants for orders that:

- (1) “this action be dismissed . . . for want of prosecution, for failure on the part of the plaintiffs to set the case down for hearing for a period of twenty-seven months of the last adjournment which was on June 8, 1965;
- (2) costs of the suit including costs of this application and all reserved and interlocutory costs . . .”

Referring to the history of this matter shortly counsel for the applicants said that this action was first filed twelve and a half years ago, on June 25, 1955 and that the events complained of go back to 1951 and concern activities in 1952 and 1953. The case was listed for hearing in January, 1956 and was taken out of the list with the consent of the parties. It was likewise taken out of the hearing list in March, 1957, June, 1959, July, 1960 and September, 1961. From September, 1961 until January 6, 1964, no further step was taken by either of the parties but on that latter date the case was set down for hearing in May, 1964. When the case came before me in May, 1964, counsel for the respondents asked for an adjournment as he was engaged in a case at Nakuru and he also said that there were a great number of documents in the matter which had not yet been copied, which was partly his fault. The adjournment was granted on the payment of the defendants’ costs. In January, 1965 a new hearing date was fixed in June, 1965, but when the case was called on before me on June 8, with the consent of the parties it was once more adjourned, the plaintiff again having to pay the defendants’ costs. Nothing happened in 1966 and in October this year this application was filed. In his affidavit counsel for the respondents has stated that it is not true that the case has not been set down for hearing for twenty-seven months. He states in his affidavit:

- (2) “On the 12th day of May, 1967, I wrote to Khanna & Co., advocates representing defendants 1, 2 and 3 herein, requiring their clerk to attend the court registry on the 18th day of May, 1967 to fix a date for hearing of the said action.
- (3) On the 18th day of May, 1967, at the court registry the said Khanna & Co.’s clerk insisted on a hearing date in November, 1967, asking for five days at hearing. The registry clerk declined to give a date for hearing six months in advance and it was agreed that a further approach be made for fixing the date later in the year.”

The matters advanced in counsel for the respondents’ affidavit have not been contradicted by the defendants.

This application is made under the provisions of O. 16, rr. 5 and 6 or other rule applicable and also under s. 97 of the Civil Procedure Act. In fact counsel for the applicants has not argued that rr. 5 and 6 apply in this case and I do not think it could be argued that r. 5 applies. Nor for that matter can r. 6 apply since the history of this case does not show that no step was taken by either party with a view to proceeding with the suit for three years though between the years 1961 and 1964 the period of three years was nearly reached. No other rule has been mentioned in the course of the argument as being relevant to this application. Counsel for the applicants’ application therefore, it seems

to me, must rest on the provisions of s. 97 of the Civil Procedure Act. No decision of the courts in this country has been referred to but counsel for the applicants referred to the case of *Fitzpatrick v. Batger & Co. Ltd.* ([1967] 2 All E.R. 657). In that case the plaintiff suffered an injury at work in December, 1961. Solicitors on his behalf issued a writ in February, 1963, and the defence was filed in April, 1963. In June, 1963, there were discussions over a settlement which came to nothing and then the action went to sleep for some eighteen months or more. In February and March, 1965, there were further negotiations which came to naught and the matter went to sleep again for nearly two years. When the plaintiff's solicitors sought to revive the matter the defendants took out a summons to dismiss the case for want of prosecution. This summons was under the provisions of R.S.C., O. 25, r. 1 (4) which provides that if the plaintiff does not take out a summons for directions (as he did not) the defendant himself may do so or he can apply for an order to dismiss the action. On appeal to the Court of Appeal from the order of the master and the judge allowing the action to be revived Lord Denning, M.R. said:

"Only last week in *Reggentin v. Beechholme Bakeries Ltd.* ((1967), 111 Sol. Jo. 216), I said that it is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. Just consider the times here. The accident was on December 13, 1961. If we allowed this case to be set down now, it would not come on for trial until the end of this year. That would be some six years after the accident. It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."

As counsel for the applicants has rightly pointed out, the delay in this present case is much worse than in what I may call *Fitzpatrick's* case (*supra*) and if the Master of the Rolls was unable to excuse the delay in *Fitzpatrick's* case he most certainly could not excuse the delay in this case. Accepting, as Lord Denning said, that public policy demands that the business of the courts should be conducted with expedition, and as Salmon, L.J. said, that it is of the greatest importance in the interests of justice that these actions should be brought to trial with reasonable expedition, and considering the undisputed history of this case I would have no hesitation, had I the power, in dismissing this action for want of prosecution. I do not see how a fair trial can be obtained after this great delay. But I do not think that I have the power to dismiss this action. There are no rules in the Civil Procedure (Revised) Rules equivalent to the English rules under which the action in *Fitzpatrick's* case was dismissed. Specific provisions for the dismissal of suits for want of prosecution are contained in the rules under O. 16 and also under O. 9, r. 16. Can the inherent jurisdiction of the court under s. 97 of the Civil Procedure Act be invoked so as to override the rules to which I have just referred? I do not think so. The inherent jurisdiction of the court was considered in the case of *Ahmed Hassan Malji v. Shirinbai Jadavji* ([1963] E.A. 217). In his judgment Sir Ralph Windham said (*ibid.* at p. 219):

"That being so, the applicant cannot invoke this court's inherent jurisdiction as preserved by s. 151 of the Indian Civil Procedure Code, since another remedy was available to her: vide Mulla's Civil Procedure Code (12th Edn.) Vol. 1, p. 660. In *Ajodhya v. Mussamat Phal Kuer* ((1922), A.I.R. Pat. 479), a case where, similarly, no application under O. 9, r. 13 had been filed in time, it was held that:

'Moreover a definite period of limitation has been prescribed by art. 164 of Sched. 1 of the Limitation Act for an application to set aside

an *ex parte* decree and the court would not be entitled, by purporting to act under s. 151 in effect to extend that period.’ ”

A definite period has been laid down in the Civil Procedure (Revised) Rules after which suits may be dismissed for want of prosecution and I do not think that I would be entitled, by purporting to act under s. 97, in effect to shorten that period.

This application must therefore be dismissed.

Application dismissed.

For the applicants:

DN Khanna

Khanna & Co, Nairobi

For the respondents:

EP Nowrojee

EP Nowrojee, Nairobi

Khaled and others v Athanas Bros (Aden) Ltd
[1968] 1 EA 31 (JCPC)

Division:	Judicial Committee of the Privy Council
Date of judgment:	22 November 1967
Case Number:	21/1966 (11/68)
Before:	Lord Guest, Lord Wilberforce and Lord Pearson
Sourced by:	LawAfrica
Appeal from:	Court of Appeal for Eastern Africa

[1] *Contract – Offer and acceptance – Counter-offer – Whether amounts to implied rejection of offer – Whether offeror must make his attitude plain to counter-offer.*

[2] *Contract – Offer and acceptance – Delay in acceptance – Whether offer lapses – What is reasonable time for acceptance – Negotiations protracted.*

[3] *Specific Performance – Contract for sale of shares – Private Company – Whether specific performance appropriate.*

Editor’s Summary

The plaintiffs (appellants in this court) and the defendants (respondents here) entered into negotiations for the purchase by the defendants of the plaintiffs’ shares in a private company in Aden, in which the

defendants' directors had a majority shareholding and the plaintiffs a minority shareholding. There had been disputes between the parties about the company from at least 1959. In 1961 the defendants made an offer to buy the plaintiffs' shares for £60,000, and later that year they offered £50,000 which was accepted by Mr. Khaled for himself and the other plaintiffs. Nothing, however, came of this. In 1962 a Mr. Wadia, agent for the defendants, offered the plaintiffs £40,000, which was accepted. The defendants' advocates prepared a draft agreement dated July 18, 1962; and later a revised draft agreement dated August 18, 1962 which was approved by the plaintiffs' advocate, Mr. Bhatt. This in effect provided for acceptance of the defendants' offer by execution of the agreement notified to the defendants. This draft agreement, and share transfers, were sent to Mr. Bhatt by the defendants' advocates. Later in August, 1962 there was a meeting in Cairo between Mr. Wadia as agent for the defendants and Mr. Khaled and Mr. Ba Saleh for the plaintiffs. Mr. Khaled did not then accept the offer. One question in the case was whether it was rejected or whether it was kept open for later acceptance. It appeared from the evidence that the plaintiffs made some attempt to modify the terms of payment set out in the draft agreement.

This attempt was replied to by a letter from the defendants dated September 25, 1962 (set out in the report). The plaintiffs finally signed the revised draft agreement on October 2, 1962, and this, the trial judge found, was notified to the defendants at the end of October. On November 5, 1962 the defendants, however, wrote to the plaintiffs purporting, in effect, to revoke their offer. After further correspondence, in the course of which the defendants suggested that their offer had been repudiated by the plaintiffs' delay in accepting it, the plaintiffs sued for specific performance of the revised draft agreement. They succeeded in the Supreme Court of Aden. The defendants appealed to the Court of Appeal, which allowed their appeal, and against that decision this appeal to the Judicial Committee was brought. The defendants argued (1) that their offer was rejected by the plaintiffs, and therefore lapsed, at or about the end of August, 1962, or (2) that it was revoked by the letter of November 5, 1962, or (3) that the purported acceptance came too late after a reasonable time for acceptance had expired.

Held –

- (i) on the evidence, the offer was not rejected;
- (ii) the attempt to modify the terms of the draft agreement could have been treated by the defendants as a counter-offer impliedly rejecting and putting an end to their offer: it was for them to indicate by their attitude whether they were keeping their offer open or not: and on the evidence (particularly their letter of September 25, 1962), they had kept their offer open;
- (iii) the negotiations were protracted, with considerable intervals between the moves and countermoves, and in the circumstances a reasonable time for accepting the offer had not elapsed when the plaintiffs accepted it.
- (iv) the defendants' purported revocation was too late;
- (v) specific performance was an appropriate remedy.

Appeal allowed with costs.

Cases referred to in judgment:

- (1) *Hyde v. Wrench* (1840), 3 Beav. 334; 49 E.R. 132.
- (2) *Tinn v. Hoffmann & Co.* (1873), 29 L.T. 271, Ex. Ch.

Judgment

Lord Pearson: delivered the following reasons for the report of the Judicial Committee: The main issue in this appeal is whether there was a concluded contract between the plaintiffs and the defendants for the purchase by the defendants of the plaintiffs' shares in a private company called the Aden Bottling Company Limited (referred to as "the Bottling Company"). The second issue is whether, if there was such a contract, an order for specific performance should be made at the instance of the plaintiffs. The Supreme Court of Aden decided both issues in favour of the plaintiffs. The Court of Appeal for Eastern Africa reversed the decision on the main issue, holding that no contract was concluded, but on the second issue they considered that if there had been such a contract an order for specific performance would have been appropriate.

It is not disputed that there was an offer made by the defendants in August, 1962. The plaintiffs'

contention is that there was a valid acceptance of it communicated at the end of October, 1962. The defendants rely on three alternative contentions (1) that the offer was rejected by the plaintiffs, and therefore lapsed, at or about the end of August, 1962 (2) that it was revoked by a letter of November 5, 1962 (3) that the purported acceptance came too late, after a reasonable time for acceptance had expired. It is necessary to examine

the oral and documentary evidence bearing on these contentions. The early history of negotiations prior to August, 1962 has some relevance, especially to the question of what would be a reasonable time for acceptance of the defendants' offer. The plaintiffs say that these were protracted negotiations with considerable intervals between the moves and countermoves.

The plaintiffs are brothers carrying on business in partnership in Kuwait as general merchants and commission agents, importers and exporters. They have business in Aden and their manager there is Mr. Ba Saleh.

The defendants are a limited company registered at Aden and carrying on a similar business. The directors are brothers called Athanassa Copoulo, and one of them, Mr. Constantine Christo Athanassa Copoulo, who played a prominent part in this case, was referred to in the evidence as "Mr. Dino".

The Athanassa Copoulo brothers had a majority interest in the Bottling Company, and three of them were directors of that Company. The plaintiffs held a minority interest: the five brothers held 500 shares each, making 2,500 shares out of 10,000, and one of them, referred to in the evidence as Mr. "Khaled" or "Khalid", was a director and Mr. Ba Saleh was his alternate director.

The evidence of Mr. Khaled, corroborated by some letters that were produced, shows that from at least 1959 onwards there were disputes between Mr. Khaled and the other directors of the Bottling Company. He was claiming for himself and Mr. Ba Saleh the right to inspect the books of the Bottling Company, and the other directors were showing some unwillingness to accord them that right. Then, according to Mr. Khaled's evidence, at some time in 1961 when he was in Aden the other directors who were present offered to buy the shares of Mr. Khaled and his brothers for £60,000. Mr. Khaled was willing to sell the shares at that price, but he said there were certain accounts to be settled. The other directors said they would consult with their uncle Michael (also a director of the Bottling Company) who was in Athens. Subsequently they reduced their offer to £50,000, and Mr. Khaled was willing to sell for that price. They said he could proceed to Kuwait, but that on their return to Aden they would prepare the necessary papers and pay out the money to Mr. Ba Saleh. Mr. Khaled waited two or three months but they did not write to him. There is a letter of May 24, 1962 which shows that at that date the dispute about inspection of the Bottling Company's books was continuing. According to Mr. Khaled's evidence he met Mr. Wadia, who was acting as agent for the defendants, in Kuwait. Mr. Wadia said he had come to Kuwait in connection with the proposed share transaction. Mr. Khaled said that the figure of £50,000 had been mentioned. Mr. Wadia said that the other directors were now willing to offer only £40,000. Mr. Khaled agreed to the figure of £40,000. The defendants' advocates prepared a draft agreement dated July 18, 1962, whereby the defendants would buy the plaintiffs' shares in the Bottling Company for £40,000, of which £20,000 was to be paid on the signing of the agreement and the remainder by four three monthly instalments of £5,000.

Shortly afterwards a revised version of the draft agreement was drawn up by the defendants' advocates and approved by the plaintiffs' advocate, Mr. Bhatt. This draft agreement was dated August 8, 1962. It provided for the plaintiffs to sell and the defendants to buy the plaintiffs' 2,500 shares in the Bottling Company for £40,000. It contained the following provisions:

- "2. . . . On the signing of this Agreement and of the forms of share transfer £28,000 to be paid into the account of Khaled Abdul Latif Al Hamad at the Midland Bank, London. Thereafter by twelve monthly instalments of £1,000. . . The Buyers to provide a Banker's guarantee that the monthly instalments shall be paid.

3. The monthly payments . . . shall be made to Khaled . . . either in Aden or elsewhere if he so desires subject to Exchange Control permission being obtainable . . .
4. As soon as this Agreement is signed the Sellers shall cease to exercise their rights as directors of or shareholders in Aden Bottling Co. Ltd.
5. The Sellers shall forthwith sign forms of transfer of their shares and deliver up existing share certificates to Aden Bottling Co. Ltd. The persons to be named in the forms of transfer to be signed by the Sellers shall be such persons whom the Buyers choose to nominate as Transferees.
6. In consideration of this Agreement the Sellers release Aden Bottling Co. Ltd. from all claims of whatsoever nature they may have or have had against Aden Bottling Co. Ltd. or its directors or shareholders.”

It is to be observed that signature and delivery of the share transfers would be part of the performance of the agreement, not part of the acceptance of the offer. The sequence would be (1) the acceptance of the offer by execution of the agreement notified to the defendants, and then (2) the signature and delivery of the share transfers by the plaintiffs in pursuance of cl. 5, and then (3) the payment of the £28,000 by the defendants in pursuance of cl. 2. It is therefore not necessary to consider some questions that were raised as to details of the share transfers. If there was any defect, it would only be a defect in performance of the contract and could easily be put right. Their Lordships agree with the view taken on this point in the judgment of the Court of Appeal for Eastern Africa.

The defendants’ lawyers sent the draft agreement and draft share transfers and copies of them to Mr. Bhatt. Then on August 13 the defendants wrote to Mr. Bhatt, saying:

“Kindly hand over to Mr. Wadia Hassanali the documents relevant to our purchase of Mr. Khaled Abdul Latif and Bros. shares in the Aden Bottling Company. These are the documents that were sent to you by our Advocates Messrs. Nunn and Kazi. Mr. W. Hassanali will personally take these documents to Kuwait for signature by Mr. Khaled Abdul Latif and his brothers.”

On August 14, 1962 the defendants wrote to Mr. Wadia (Hassanali) in Cairo sending share transfer forms and saying that they were sending copies to his address in Kuwait, and the writer said “Trust your mission will be completely successful and I look forward to news from you”.

It is clear from these two letters and later letters, which will be mentioned, and from the oral evidence and from the defendants’ pleading (called the Written Statement) that Mr. Wadia was the agent of the defendants in this transaction, i.e., the proposed agreement for the purchase by the defendants of the plaintiffs’ shares in the Bottling Company for £40,000.

In Cairo in the latter part of August, 1962 there was at least one meeting between Mr. Wadia as agent for the defendants and Mr. Khaled and Mr. Ba Saleh acting for the plaintiffs. All three of them gave evidence, Mr. Khaled on commission as a witness for the plaintiffs, Mr. Wadia on commission as a witness for the defendants, and Mr. Ba Saleh at the trial as a witness for the plaintiffs. After the meeting there was some correspondence, to which reference will be made.

It is plain that Mr. Khaled did not accept the offer in Cairo, but the crucial question is whether the offer was rejected or whether it was kept open for later acceptance. The learned judge decided that it was not rejected, and his decision on this point appears to their Lordships to be supported both by the oral

evidence and by the correspondence. The evidence of the three witnesses already mentioned showed that at the meeting or meetings in Cairo Mr. Khaled expressed approval of the proposed agreement; but he wished to take the proposed agreement and other documents to Kuwait to show to his brothers and consult with them: Mr. Wadia said he could not let Mr. Khaled take the original documents which had been entrusted to Mr. Wadia for obtaining signatures on behalf of the plaintiffs, and these documents were handed back to Mr. Wadia: but Mr. Khaled said that would not matter because he had received another set of the documents from Mr. Bhatt and these could be signed in Kuwait and sent to Mr. Ba Saleh to be given to Mr. Bhatt. There is a probable inference from Mr. Wadia's evidence that he agreed with this suggestion, and Mr. Ba Saleh's evidence was that Mr. Wadia said to Mr. Khaled "As long as you have got two copies of the same document sign it and send it to the advocate in Aden". On that evidence it appears that the offer was not rejected but was being kept open for possible acceptance after Mr. Khaled had shown the documents to his brothers in Kuwait and consulted with them.

There is however also some evidence of Mr. Khaled and Mr. Ba Saleh having tried to obtain some addition to or modification of the terms of payment set out in the offer. The most important evidence of that is contained in a letter of August 31, 1962 written to Mr. Wadia by Mr. Khaled who was then leaving Cairo. This is the translation:

"Dear Son,

I am sorry to inform you that I had intended to leave to India with His Highness the Prince, Sheikh Mohd. Ba Saleh will leave to Aden at the end of the ninth month, and he has all the power to represent us, no need to refer to us or to Kuwait. I have already informed Mr. Ba Saleh with all we need. Please inform your friends that if they have agreed upon our conditions, they should write the papers and hand them over to Ba Saleh and he will send them to my brothers for signature and to send them back in time. The conditions are well known to you, they should pay the agreed amount in cash, after we receive payment we will hand over the papers to them. No reference should be made to us, we have delegated powers to Mr. Ba Saleh that, if he sees any delay, he should take an immediate steps, because your friends intends the delay and waste of time.

Khaled A. Latif."

There are two different versions of the conditions referred to in that letter. Mr. Khaled said in his evidence that, in connection with the bank guarantee of the payment of the twelve instalments of £1,000 each, it was desired to have twelve separate documents which would be signed by the bank and would be similar to bills of exchange so that they could be used for raising money. A different version would be derived from two letters from Mr. Wadia to Mr. "Dino" dated August 27 and September 2, 1962. These letters had been put in subject to objection when the evidence was taken on commission and were ruled inadmissible by the learned judge, evidently under ss. 105 (2) and 87 of the Civil Courts Ordinance on the ground that the defendants had failed duly to enter these letters in the list of documents annexed to their "written statement". Their Lordships find it unnecessary, as did the Court of Appeal, to decide whether or not the letters were admissible, or, if discretion was involved, should have been admitted. Whatever the "conditions" were, it seems clear that Mr. Khaled and Mr. Ba Saleh were trying to obtain some addition to or modification of the terms of payment set out in the proposed agreement. This attempt could have been treated by the defendants as a counter-offer impliedly rejecting and putting an end to the offer: *Hyde v. Wrench* ((1840), 3 Beav. 334); *Tinn v. Hoffmann & Co.* ((1873), 29 L.T. 271). The Court of Appeal held that the letter

did have that effect. But in their Lordships' opinion the Court of Appeal did not sufficiently take into account the answering letter, which is an equally or even more important letter, because it shows the defendants' attitude expressed by their agent Mr. Wadia. The offer was their offer, a unilateral act, and it was for them to indicate by their attitude whether they were keeping it open or not. The answering letter was dated September 25, 1962 and was written by Mr. Wadia to Mr. Khaled. It was (after translation from the Arabic) as follows:

"Dear uncle Khalid Abdul Latif Al Hamad. God save you. After Salams I hope that you are in a good health. We received your letter dated 31st August 1962 through brother Mohamed Ba Saleh in Cairo. We hope you will meet your brothers soon after your return to Kuwait. And we request to send to brother Mohamed Ba Saleh or to advocate Bhatt the agreement together with transfer shares forms after signing them on behalf of yourself and on behalf of your brothers, and I shall ask Athanas to get ready the papers and also bank guarantee for 12000 twelve thousand pounds as demanded by you. Family and mother are well. Please give my salams to mother of Abdul Latif thousand salams.

Your son,

Wadi Hasonali."

That answering letter is evidently referring to the original offer, which provided for a bank guarantee covering the £12,000 to be paid by instalments. The letter affords evidence, corroborating the oral evidence, of the arrangement made in Cairo, that the offer would be kept open for later acceptance after Mr. Khaled should have shown the documents in his possession (the counterparts) to his brothers in Kuwait, and that the mode of acceptance would be by the plaintiffs signing the documents and sending them to Mr. Ba Saleh or Mr. Bhatt for communication to the defendants. The letter also shows the defendants adhering to that arrangement. They might have adopted a different attitude but in fact they adhered to the arrangement made in Cairo at the end of August.

The delay of more than three weeks between the letter of August 31 and the answering letter of September 25 was not explained.

According to his own evidence Mr. Khaled, having gone to Kuwait on August 31, left for India with the Sheikh of Kuwait on the next day, September 1; he returned to Kuwait from India on October 1. He signed the agreement for himself and as attorney for his brothers on October 2, and he and his brothers signed their respective share transfers. He then forwarded these documents to Mr. Bhatt through Mr. Ba Saleh. Mr. Ba Saleh seems to have stayed in Cairo. At any rate, according to his own evidence, he returned to Aden on October 21, 1962 and three or four days afterwards he collected his post and found a letter from Mr. Ahmed, the brother of Mr. Khaled, and the counterpart agreement signed by Mr. Khaled and the signed share transfers, and a letter addressed through Mr. Ba Saleh to Mr. Bhatt. He enquired for Mr. Bhatt and ascertained that he was away from Aden and would be returning in December. Then Mr. Ba Saleh after two or three days at the end of October went to the office of Mr. Dino and saw Mr. Dino personally and told him that the documents had been signed by Mr. Khaled and his brothers. He requested Mr. Dino to arrange for the first payment of £28,000 to be paid in London in accordance with the agreement. Mr. Dino said: "Wait for a few days, and I will send telegrams to my brothers". After a few more days Mr. Ba Saleh went to Mr. Dino again, and Mr. Dino said to him "Wait. We sold our building near by our factory for 25,000 to 30,000 in order to settle the account of Khalid and his brothers but wait until I receive a reply from my brothers. I will write to them."

That was Mr. Ba Saleh's account of these interviews. It was strongly denied by Mr. Dino but accepted by the judge. There were undoubtedly grounds on which the learned judge could prefer the evidence of Mr. Ba Saleh to that of Mr. Dino. A simple ground is that Mr. Dino said in his evidence that there were no disputes between the defendants and Mr. Khaled prior to the agreement, whereas the early letters produced showed that there were such disputes. There were also other matters which could be regarded as raising doubts as to the reliability of Mr. Dino's evidence. At any rate the learned trial judge heard and saw these two witnesses and his preference for Mr. Ba Saleh's evidence must be respected.

When Mr. Ba Saleh's evidence as to these interviews is taken to be correct, it shows that the plaintiffs accepted the defendants' offer at the end of October. The acceptance was by Mr. Ba Saleh informing the defendants that the plaintiffs had signed the documents.

By a letter of November 5, 1962 (which by an obvious mistake was signed "the Aden Bottling Co. Ltd.") Mr. Dino wrote to the plaintiffs:

"As has already been conveyed through our mutual friend Mr. Wadia Hassanali, we are not any longer interested in purchasing your shares and we hope Mr. Wadia has reported this matter to you. We are however prepared to offer you our shares for £120,000. If you are not interested in the purchase, we shall upon hearing from you and in consultation with Mr. Ba Saleh try and find a buyer for the whole lot of shares (ours and yours inclusive). We are endeavouring our best to sell the whole lot of shares at best obtainable price. However in this connection Mr. Ba Saleh called on us recently to convey the contents of your letter to him. . . ."

This letter could not operate as an effective revocation of the offer after it had been accepted at the end of October. It affords evidence of the continuing agency of Mr. Wadia for the defendants in respect of the proposed purchase by the defendants of the plaintiffs' shares in the Bottling Company. He was therefore the defendants' agent in respect of this proposed transaction when he wrote the letter of September 25.

On December 31, 1962, Mr. Bhatt, having returned from abroad, wrote to the defendants' advocates, saying:

"I refer you to my letter No. 400/8/62 of August 13, 1962 and since then my clients have returned to me the Original Agreement and Transfer Forms of shares held by them duly signed by all the partners of Messrs. Khalid Abdul Latif and Bros. and the documents are ready for delivery to you against payment at London a sum of £28,000 . . . as being the first instalment mentioned in the Agreement dated August 8, 1962 signed by you and by all the partners of the said firm of Khalid Abdul Latif and Brothers. You will please let me know whether the amount has been paid and if so when the same was paid at London. In case the amount is still not paid, will you be good enough to inform me as to when you will arrange such payment at London."

On January 9, 1963 the defendants' advocates wrote to Mr. Bhatt:

"We are instructed to reply to your letter dated December 31.

In view of the fact that the documents were sent to you for signature on August 8 and there has been a delay of nearly five months, our clients take the view that this delay in completing the transaction entitles them to regard it as having been repudiated by your clients. . . ."

On March 19, 1963 Mr. Bhatt wrote to the defendants' advocates:

“I refer you to your letter of January 8, 1963 and I am now instructed to inform you that there was no delay on the part of my clients. My clients long before informed your clients for their having signed the agreement which was sent to them for their signature and which was already signed by your clients.

So far as the delay is on the part of your clients, who have to act upon the agreement by making payments agreed therein. . . .”

The omission from Mr. Bhatt’s letter of December 31, 1962 of any mention of Mr. Ba Saleh having at the end of October informed Mr. Dino of the plaintiffs’ acceptance of the defendants’ offer is surprising. However Mr. Ba Saleh dealt with this point in his cross-examination and the learned judge accepted his evidence, saying:

“I am also satisfied that although there is no mention in Mr. Bhatt’s letter of December 31, 1962 of Ba Saleh’s interviews with Dino and of Dino’s promises to pay, Ba Saleh did inform Mr. Bhatt of these incidents. I accept the testimony of Ba Saleh that although he did so inform Mr. Bhatt, Mr. Bhatt chose to draft the letters in that form.”

This again is a point on which the learned judge’s view as to the credibility of the witness Ba Saleh – who gave evidence before him, not on commission – ought to be respected. The evidence is not incredible. Mr. Khaled said that he left Kuwait for Egypt on October 4, 1962 and did not return to Kuwait until January 1, 1963. Mr. Ba Saleh said he did not see the letter of November 5, 1962 or a copy of it until Mr. Khaled gave him a copy in 1963. If Mr. Bhatt did not know of the defendants’ desire to withdraw from the transaction and thought the agreement was settled and concluded and only performance of it was required, he might well consider it unnecessary to state the date and method of communication of the acceptance.

The letter of January 9, 1963 from the defendants’ advocates to Mr. Bhatt raises a serious difficulty for the defendants’ contentions. This is referred to in the judgment of the President of the Court of Appeal. He said, mentioning the writer of the letter, that he:

“Referred to the defendant company’s offer as repudiated by delay, a position inconsistent with rejection of the offer at Cairo or, indeed, withdrawal of the offer before communication of acceptance. I find it difficult to give a rational explanation of this letter and I do not find Mr. O’Donovan’s explanation, which was that the letter was badly drafted, as very convincing. I accept that this letter is not consistent with what I believe to be the true position. If however, I assume that the offer at Cairo was not rejected but was accepted there are, in my opinion, so many facts inconsistent with such an assumption that I am forced to reject it. In the result, in spite of the inconsistency created by this letter, I have come firmly to the conclusion that the offer was rejected at Cairo, and that the trial judge erred in not dismissing the suit.”

With regard to this passage in the judgment of the President it must be pointed out with respect that he was assuming only two possibilities, namely acceptance or rejection of the offer at Cairo, whereas in their Lordships’ opinion, which accords with the findings of the learned judge, the effect of the evidence, both oral and documentary, is that at Cairo the offer was neither accepted nor rejected but was kept open for future acceptance by the plaintiffs after consultation by Mr. Khaled with his brothers in Kuwait.

A further question is whether the purported acceptance at the end of October, 1962 came too late, after a reasonable time for acceptance had expired. This

is a substantial question, as the period of about two months which elapsed between the communication of the offer towards the end of August and the communication of the acceptance towards the end of October seems very long. Especially it can be urged that in view of unsettled conditions in South Arabia, where a revolution had started in the Yemen (on September 27, as counsel stated, there being no evidence of the date), a prompt or at any rate an earlier acceptance or rejection should have been given. But the course of the negotiations is important on the issue of what was a reasonable time for acceptance. The negotiations had started in 1961 and continued in 1962 and can be fairly described as protracted with considerable intervals between the moves and countermoves. It was arranged in Cairo that the offer should be kept open for Mr. Khaled to consult his brothers in Kuwait. Mr. Wadia, the defendants' agent, knew from the letter of August 31 that Mr. Khaled had to go to India. Mr. Wadia did not reply to the letter until more than three weeks later, and he was adhering to the arrangement. The documents were signed on October 2, and only the communication of the acceptance was delayed. According to Mr. Ba Saleh's evidence, accepted by the learned judge, when the acceptance was communicated by Mr. Ba Saleh to Mr. Dino at the end of October Mr. Dino received and acquiesced in the acceptance without making any suggestion that it was out of time. On the whole it cannot be said that a reasonable time for acceptance of the offer had elapsed.

The remaining question is whether specific performance is the appropriate remedy in this case. On this question the Court of Appeal agreed with the learned judge's decision that an order for specific performance would be appropriate. The President said:

"The fact that disputes had arisen between the owners of the shares of the Bottling Company and the fact that there must have been a limited market for those shares provided, in my view, ample justification for the trial judge in his discretion making the order for specific performance".

Their Lordships are in agreement with this view.

Their Lordships have humbly advised Her Majesty that this appeal be allowed, the judgment and order of the Court of Appeal for Eastern Africa dated February 24, 1966 set aside and the judgment and decree of the Supreme Court of Aden dated June 9, 1965 restored. The respondents must pay the appellants' costs of this appeal and in the Court of Appeal for Eastern Africa.

Appeal allowed. Order accordingly.

For the appellants:

Godfrey Le Quesne, QC, Gerald Davies and Mrs. Betty Knightley
TL Wilson & Co

For the respondents:

B O'Donovan, QC and EG Nugee
Gordon, Dadds & Co

Wambua v Wathome and another **[1968] 1 EA 40 (HCK)**

Division: High Court of Kenya at Nairobi

Date of judgment: 29 November 1967

Case Number: 1108/1967 (188)

Before: Farrell J

Sourced by: LawAfrica

[1] *Practice – Amendment of pleading – Plaintiff – Whether amendment should be allowed if plaintiff as amended would not disclose good cause of action – Whether suit should be dismissed – Civil Procedure (Revised) Rules 1948, O. 6, rr. 17, 29 (K.).*

[2] *Practice – Striking out pleading on ground of no reasonable cause of action – Civil Procedure (Revised) Rules 1948, O. 6, r. 29 (K.).*

[3] *Land – Land Control – Delay in obtaining consent of Land Control Board to sale of land – Effect – Kenya Constitution, s. 218 (2); Kenya (Land Control) (Transitional Provisions) Regulations 1963, reg. 12 (3) (K.).*

Editor’s Summary

On February 15, 1967 the parties to the suit agreed to the sale of some land, which sale required the consent of the Divisional Land Board. On April 3, 1967, within the period of three months from the making of the agreement laid down by s. 218 (2) (a) of the Kenya Constitution, application was duly made to the Divisional Land Board for consent. On June 26, 1967 the Board resolved:

“Although the Board was of the opinion that there was no adequate facilities it was apparent that there was no real ground for turning down the application. In the meantime, however, it was decided that the vendor be asked in writing to explain what he was intending to do with the rest of the farm.”

On September 29, 1967 the plaintiff filed a suit for, *inter alia*, specific performance of the sale; but the Board did not give its consent to the sale of the land until November 14, 1967. In the meantime the defendants applied to strike out the plaintiff as disclosing no cause of action because no consent of the Board to the sale was pleaded. The plaintiff then applied to amend the plaintiff to plead the consent by the Board in November. Section 218 (2) of the Kenya Constitution provides that:

“Any agreement to be a party to any land transaction shall be absolutely void for all purposes (a) at the expiration of three months after the making of the agreement if application for the consent has not been made within that time to the appropriate Divisional Board; or (b) if an application is made and refused, at the end of 30 days from such refusal, or where an appeal for such refusal has been instituted under s. 220 of the Constitution on the dismissal of the appeal”.

Regulation 12 (3) of the Kenya (Land Control) (Transitional Provisions) Regulations 1963 provided:

“Where a person has made due application to a Divisional Board for its consent to a land transaction and the Board has not made a decision thereon within three months after the date of such application, the application shall be deemed to have been refused”.

The question therefore was whether the Board’s resolution on June 26 was a “decision” within the regulation.

Held –

- (i) a postponement of a decision as indicated by the Board on June 29, 1967 is not a “decision” within the meaning of reg. 12 (3);

- (ii) the said regulation is valid;
- (iii) no lawful consent had been obtained and accordingly there was no valid cause of action;
- (iv) therefore the application to amend should be refused.

Application to amend refused. Plaintiff ordered to be struck out and suit dismissed with costs to the defendant.

No cases referred to in judgment

Judgment

Farrell J: This is an application by the defendants to strike out the plaintiff as disclosing no cause of action. The application purports to be brought under O. 6, rr. 17 and 29 of the Civil Procedure (Revised) Rules 1948 and the inherent power of the court, but in my view the only rule which is applicable is r. 29 and there is no need to invoke the inherent powers.

The plaintiff claims certain reliefs based on a contract for the sale of land. The ground of the defendants' objection is that by s. 218 (2) of the Constitution it is provided that:

“Any agreement to be a party to any land transaction shall be absolutely void for all purposes;

- (a) at the expiration of three months after the making of the agreement if application for consent has not been made within that time to the appropriate Divisional Board; or
- (b) if an application is made and refused, at the end of thirty days from such refusal or, where an appeal from such refusal has been instituted under s. 220 of this Constitution, on the dismissal of the appeal.”

It is common ground that this provision, for reasons set out in my order in this suit dated November 1, 1967, is still in force, and that it applies to the land the subject of the proceedings. That being so, counsel for the plaintiff has fairly conceded that he must plead the consent before he can establish his cause of action, and he asks leave to amend the plaintiff by inserting a new para. 6B in the following terms:

“6B. Consent of the Masaku/Donyo Sabuk Divisional Board to the said sale was duly given in writing dated November 15, 1967 pursuant to an application of the parties received by the said Board sometime after April 3, 1967 and pursuant to a consent accorded on November 14, 1967 at the Board's 23rd Meeting after a decision of the said Board made on June 28, 1967 which gave provisional consent:

Minute 7/1967.

Although the Board was of the opinion that there was no adequate facilities it was apparent that there was no real ground for turning down the application.

In the meantime, however, it was decided that the Vendor be asked in writing to explain what he was intending to do with the rest of the farm.”

According to The Annual Practice (1963), p. 576 on the corresponding English provision, R.S.C., O. 25, r. 4, the court will generally give leave to amend a defect in pleading rather than give judgment on an application to

strike out; but unless there is reason to suppose that the case can be improved by amendment, leave will not be given. I take these principles to be equally applicable to the corresponding procedure in this country and the first issue to be decided is whether the proposed amendment, if allowed, would cure the admitted defect in the plaint so as to disclose a reasonable cause of action.

I have already in my order mentioned above, set out the law at present in force in relation to contracts for the sale of land. Apart from s. 218 (2) of the Constitution, which I have already cited, the most material provision is r. 12 (3) of the Kenya (Land Control) (Transitional Provisions) Regulations 1963 (L.N. 457/1963) which reads:

“Where a person has made due application, under reg. 10 or reg. 11 of these regulations, to a Divisional Board for its consent to a land transaction and the Board has not made a decision thereon within three months after the date of such application the application shall be deemed to have been refused.”

Counsel for the defendants submits that, according to the pleadings, as proposed to be amended, the contract was dated February 15, 1967, application for consent was made on or about April 3, 1967, and as no decision in terms of reg. 12 (3) had been made before July 3, 1967, the application thereupon was “deemed to have been refused”, and the agreement itself, by virtue of s. 218 (2) (b) of the Constitution became void for all purposes at the end of thirty days after the date of such notional refusal. As the plaint was not filed until September 29, 1967, the contract on which it was founded was at that date void for all purposes. The fact that consent was purportedly given on November 14, 1967, is he submits immaterial since at that date there was no valid application in existence and the purported consent was a nullity.

Counsel for the plaintiff submits, as appears from the terms of the proposed amendment, that the Divisional Board made a decision within the meaning of reg. 12 (3) when it “decided” to ask the vendor for certain further information. Alternatively, he submits that the regulation itself is unenforceable as being ambiguous, unreasonable, and ultra vires.

As regards the first submission I take it as clear beyond argument that a decision for the purposes of reg. 12 means a decision finally disposing of the application in one way or the other, and that a decision to postpone further consideration of the application in the meantime is not a decision within the meaning of the regulation.

So far as the validity of the regulation is concerned, I confess I can find in it no ambiguity whatsoever: and while it is obvious that some inconvenience and possibly injustice might arise from the brevity of the period allowed for the necessary inquiries and deliberations, and the peremptory terms of the paragraph, I should require much more cogent arguments than have been adduced before I should be persuaded that the provision was void as being unreasonable or ultra vires or on any other of the grounds which have been put forward. It is not entirely irrelevant to notice that a similar provision had been in force as part of an Ordinance, and not merely in the form of delegated legislation, since 1949 (s. 7 (3) (b) of the Land Control Ordinance, Cap. 150 of the 1948 Revision, as substituted by s. 2 of the Land Control (Amendment) Ordinance (No. 38 of 1949)), and that the present regulations, although enacted in the first place as delegated legislation, have been given statutory effect by s. 6 (7) of the Constitution of Kenya (Amendment) Act 1965 (Act No. 14 of 1965), the same Act, be it noted, by virtue of which Part 3 of Chapter 12 of the Constitution, including s. 218 (2), was continued in force.

For these reasons it seems to me clear that the proposed amendments to the plaint would not be effective to cure the admitted defect, and I need not take into consideration the further point that one of the events now sought to be pleaded, viz., the consent purportedly given by the Divisional Board on November 14, 1967, took place some weeks after the date of the plaint, and so would not appear capable of being prayed in aid for the purpose of showing that a good cause of action was disclosed at the date of the institution of the suit.

For the above reasons the proposed amendment must be refused and there will be an order that the plaint be struck out and the suit dismissed with costs to the defendants.

Order accordingly.

For the plaintiff:

HN Armstrong

Hamilton Harrison & Mathews, Nairobi

For the first defendant:

P le Pelley

Archer & Wilcock, Nairobi

For the second defendant:

GS Pall

GS Pall, Nairobi

Kagenyi v Musiramo and another [1968] 1 EA 43 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	6 December 1967
Case Number:	39/1967 (4/68)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Jurisdiction – Suit originating in court without jurisdiction – Whether High Court can make an order for the transfer of a suit if the original court has no jurisdiction – Civil Procedure Act, s. 18 (U.).*

[2] *Practice – Transfer of suit – Whether suit originating in court which has no jurisdiction to try it can be transferred – Civil Procedure Act, s. 18 (1) (U.).*

Editor's Summary

An application was brought for an order of the High Court to transfer a suit to the High Court for due trial and determination on the ground that the court of the magistrate grade II, Bukoto, Kabula, before which court the case was pending, had no jurisdiction to try the case. The total value of the cattle, the subject matter of the case, was stated to be well over Shs. 10,000/- whereas the jurisdiction of the magistrate in civil matters was limited to Shs. 1,000/-.

Held –

- (i) section 18 of the Civil Procedure Act gives a general power of transfer of all suits, which may be exercised at any stage of the proceedings even suo motu by the court without application by any party;
- (ii) an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it;
- (iii) the subject matter of the application on the admission and showing of the applicant had been instituted in a court without jurisdiction and it was therefore incompetent for the case to be transferred to the High Court for hearing and determination.

Application dismissed with costs to the respondent.

Cases referred to in judgment:

- (1) *Matayo K. Kaboha v. Abibu Bin Abdulla and Others* (1936–51), 6 U.L.R. 121.
- (2) *Ledgard and Another v. Bull*, [1886] A.C. 648.
- (3) *Pearly Lall Mozoomdar v. Komal Kishore Dassia*, [1880] Ind. L.R. (Cal.) 30.

Judgment

Sir Udo Udoma CJ: This is an application by a notice of motion made pursuant to s. 18 of the Civil Procedure Act. The application is brought by the plaintiff (hereinafter to be referred to as the applicant) in a suit No. 158/67 – *Paulo Lubega v. Musiramo and Another* – alleged to be pending in the court of a magistrate grade II, Bukoto, Kabula. The application, which is supported by an affidavit sworn to by counsel for the applicant, is for an order of this court transferring the suit aforesaid to the High Court for due trial and determination.

The application is opposed by the defendants, hereinafter to be referred to as the respondents. Neither the respondents nor their counsel has filed a counter-affidavit to the affidavit sworn to by counsel for the applicant. The allegations of facts contained in the applicant's affidavit are therefore uncontradicted and unchallenged on oath and must be accepted by this court as the truth of the averments therein contained.

The ground for this application is that the court of the magistrate grade II, Bukoto, Kabula, has no jurisdiction to try the case as the value of the property, the subject matter of the claim, is far in excess of the jurisdiction of the magistrate grade II. This allegation is to be found in paras. 3, 4, and 5 of the affidavit filed on behalf of the applicant. The sum total of the allegation is that the claim of the applicant in the court at Bukoto, Kabula is for sixty head of cattle valued at between Shs. 500/- and Shs. 150/- per head; and that the total value of the cattle is well over Shs. 10,000/-, which is far beyond the jurisdiction conferred on that court by the Magistrates' Courts Act. Under the Magistrates' Courts Act the jurisdiction of a magistrate grade II in civil matters is limited to Shs. 1,000/-. (See Second Schedule to the Act.)

The provisions of s. 18 of the Civil Procedure Act in so far as the same are relevant to this application are in the following terms:

- “18 (1). On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without notice, the High Court may at any stage:
- (a) . . .
 - (b) withdraw any suit or other proceedings pending in any court subordinate to it, and
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (iii) . . .”

Normally this application should succeed especially as no reasonable ground has been advanced by counsel for the respondents against the transfer of the suit to the High Court. In his submission in opposing the applicant, counsel for the respondents merely stated that the cattle, the subject matter of the

claim, have not been valued by a licensed valuer or assessor. It was difficult to comprehend the point of this submission for, after all, it is for the applicant to value the subject matter of his claim; and at the trial the burden would rest

upon him of establishing by evidence to the satisfaction of the court the value which he has attached or given to his property. That, of course, is a matter of evidence and proof.

It is a well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities for stating that the principal matters to be taken into consideration are balance of convenience, questions of expense, interests of justice and possibilities of undue hardship; and if the court is left in doubt as to whether under all the circumstances it is proper to order a transfer, the application must be refused: see *Matayo K. Kaboha v. Abibu Bin Abdulla and Others* ((1936–51), 6 U.L.R. 121).

In the present application none of these matters has been raised by the respondents. It has not been submitted by counsel for the respondents that to grant the application would in any way inconvenience the respondents; or that it would not be in the interests of justice; or that undue hardship would be caused the respondents if the application were granted. These questions do not therefore arise for consideration in this matter.

The only question which had exercised my mind and to which the attention of counsel for the applicant was drawn in the course of his submissions is one affecting the jurisdiction of the magistrates' court, Bukoto, Kabula. In his affidavit supporting the application counsel for the applicant had sworn that the value of the cattle claimed was about Shs. 10,000/- and therefore far in excess of the jurisdiction of the magistrate before whom the suit is pending. It seems to me that the suit having been instituted in a court without jurisdiction it would be incompetent for this court to have the suit withdrawn therefrom.

When the attention of counsel for the applicant was drawn to this aspect of the matter, he contended that regardless of the fact that the suit had originated in a court without jurisdiction, it was competent for this court to exercise the powers conferred upon it by s. 18 of the Civil Procedure Act. I do not agree with this contention.

While it may be argued that since the provisions of s. 18 of the Act do not restrict the powers of the High Court in this respect, it is difficult to see how a wrongly constituted suit could be transferred to another court for trial especially as the jurisdiction of the court of origin of the suit, which is a fundamental question, is involved.

I have had therefore to refer to the rules and practice of the Supreme Court of England, but more precisely to the County Courts Act 1959, on the question of transfer, for some guidance, as there appears to be no reported decision of this court on the point involved in this application. In doing so, I must state that the decision of this court in this matter is not in any way based on such rules and practice. It is necessary to emphasize this point because the rules of this court are not based on the English rules and practice. They are based on the Indian Code of Civil Procedure to which I propose later in this ruling to make reference.

In *The Annual Practice* (1967) Vol. II, there is to be found at p. 1031, para. 3934, s. 66 of the County Courts Act 1959, the following provisions:

- “66. Where any proceedings are commenced in a county court in which a county court has no jurisdiction, the court shall, unless it is given jurisdiction by an agreement made under the provisions of s. 42 or 53 or sub-s. 5 of s. 56 of this Act, order that the proceedings be transferred to the High Court:

Provided that where, on the application of any defendant, it appears to the court that the plaintiffs or one of the plaintiffs knew or ought to have known that the court had no jurisdiction in the proceedings, the court may, if it thinks fit, instead of ordering that the proceedings be transferred as aforesaid, order that they be struck off.”

On the basis of these provisions, it seems plain that, if it were in England, as the plaintiff had known having regard to his affidavit that the court of the magistrate at Bukoto, Kabula had no jurisdiction to try the case now pending in that court, on the application by counsel for the respondents it would have been entirely in the discretion of this court either to grant the application to transfer it, or to order that the case be struck off. No such application has been made by the respondent in the present proceedings. There is the further difference that the order either to transfer or strike off could only have been made by the county court itself. I do not therefore think that the provisions of s. 66 of the County Courts Act have any application to this matter.

In the circumstances methinks that the proper authority to which reference ought to be made is the Indian Civil Procedure Code. I propose therefore to examine the provisions which are contained in Mulla. It is of interest to observe that in Mulla’s Civil Procedure Code (10th Edn.), p. 130 the provisions of s. 18 of the Uganda Civil Procedure Act were lifted word for word from s. 24 (formerly s. 25) of the Indian Code of Civil Procedure. Not a single phrase or sentence was altered. Mulla therefore is without doubt the best authority on the construction and effect of s. 18 of the Uganda Civil Procedure Act.

In their commentary at p. 131 on the provisions of s. 24 of the Indian Code under the title “Jurisdiction”, the editors of Mulla state quite categorically and without dubiety that the section gives a general power of transfer of all suits, appeals or other proceedings which may be exercised at any stage of the proceeding even suo motu by the court without any application by any party. The editors further state that an order for the transfer of a suit from one court to another cannot be made under s. 24 of the Indian Code, unless the suit has been in the first instance brought in a court which has jurisdiction to try it; and that if, after the transfer is made, the parties without objection join issues and go to trial upon the merits, the order of transfer cannot be subsequently impeached.

I am of the opinion that the above commentary by the editors of Mulla is sound and unimpeachable. This point was considered by the Privy Council in *Ledgard and Another v. Bull* ([1886] A.C. 648), which was an appeal from the High Court of the North-West Province of Bengal. The case itself concerned patents and both the High Court of Bengal and the Privy Council had to deal and construe the Patent Law Amendment Act 1852, s. 41 as to the sufficiency of particulars of infringement. Although, in the course of its judgment, the Privy Council overruled the High Court, that the particulars given by the plaintiff were a sufficient compliance with the Act, it nevertheless dismissed the appeal and the suit for want of jurisdiction in the High Court to try the case.

In a passage of the judgment of the court, Lord Watson, who delivered the judgment of the court, said ([1886] A.C. at p. 657):

“In the argument addressed to their Lordships it has not been disputed, and it does not appear to admit of doubt, that a suit for infringement could not be completely instituted in the court of the subordinate judge. Section 22 of the Patent Act expressly provides that no such suit shall be maintained before that court; and the first essential step in the maintenance of a suit is its due institution. In the opinion of their Lordships, the transference of the suit to the district court was equally incompetent. It was decided by the High Court of Calcutta on June 10, 1880 that the

Supreme Court cannot make an order of transfer of a case under s. 25 of the Civil Procedure Code, unless the court from which the transfer is sought to be made has jurisdiction to try it. Having regard to the terms of s. 25, their Lordships entirely approve of that decision. Apart, therefore, from any question of estoppel affecting the defendant, there was no competent suit pending at the plaintiff's instance on April 6, 1882, when the defendant raised the plea of no jurisdiction in his written statement of defence."

See also *Pearly Lall Mozoomdar v. Komal Kishore Dassia*, ([1880] Ind. L.R. 6 (Cal.) 30).

In the result, this application is refused. It is dismissed because the subject matter of the application on the admission and showing of the applicant having been instituted in a court without jurisdiction, namely, the court of a magistrate grade II, Bukoto, Kabula, it is incompetent for this court to transfer the same to the High Court for hearing and determination. Costs of this application to the respondents. Order accordingly.

Application dismissed.

For the applicant:

Abu Mayanja

Abu Mayanja & Co, Kampala

For the respondent

CB Kakooza

Kiwanuka & Co, Kampala

New Wangigi Hotel v Kabungo [1968] 1 EA 47 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	9 January 1968
Case Number:	129/1967 (9/68)
Before:	Rudd and Dalton JJ
Sourced by:	LawAfrica

[1] *Rent Restriction – Agreement in writing fixing rent of business premises – Effect of – Whether Rent Tribunal has power to determine rent thereafter – Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 1965, ss. 4, 12 (4) and 13 (K.).*

Editor's Summary

The respondent served a notice on the appellant firm as his tenants of premises subject to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 1965, demanding an increase of rent to Shs.

2,900/- per month. On June 22, 1966 the appellant complained to the rent tribunal under s. 12 (4) of the Act against the proposed increase, citing “Yunis Butchery” as the party seeking the increase. The respondent was not joined, although he was the person who had become entitled to the premises subject to the tenancy. On June 25, 1966, the appellant firm agreed in writing with the respondent that the rent be increased to Shs. 2,300/- per month and that the complaint be withdrawn from the tribunal. Contrary to the terms of this agreement, however, the appellant proceeded *ex parte* against “Yunis Butchery”. The tribunal assessed Shs. 1,500/- a month as a fair rent. Under s. 13 of the Act the respondent applied to the tribunal for the assessment to be set aside and (*inter alia*) for Shs. 2,300/- a month to be substituted as the rent, as agreed between the parties on June 25, 1966. This application was refused. On appeal by the respondent to the resident magistrate’s court the appeal was allowed, that court holding that the tribunal had no power to assess a lower rent than that agreed by the parties

in writing on June 25, 1966 of Shs. 2,300/- per month. On further appeal by the appellant to the High Court:

Held –

- (i) the agreement of June 25, 1966 put an end to the basis of the application to the Tribunal of June 22, 1966, which the appellant should have withdrawn;
- (ii) under s. 4 of the Act an agreement in writing as to the amount of an increase in rent is valid and (unlike the Rent Restriction Acts applying to dwelling houses) a tenant has no right to question a rent agreed in writing;
- (iii) section 12 (4) of the Act giving power to the tribunal to determine the rent is not applicable where the rent has been determined by a valid subsisting agreement in writing.

Appeal dismissed with costs.

No cases referred to in judgment

Judgment

Rudd J: delivered the following judgment of the court: The appellant is a partnership firm which appears to have been the tenants of proprietors, a firm called Yunis Butchery, of certain premises which are subject to the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 1965, which we shall call the Act, at a rent of Shs. 2,000/- a month.

Yunis Butchery appears to be run by the two administrators of a deceased's estate or at any rate the said administrators were the real landlords of the property which was subject to that tenancy and the respondent became entitled to the property subject to the appellant's tenancy.

The respondent served notice upon the appellant for an increase of rent to Shs. 2,900/- a month and the appellant on June 22, 1966, complained to the tribunal under s. 12 (4) of the Act against the proposed increased rent of Shs. 2,900/- a month. The complaint was lodged against Yunis Butchery and in fact the respondent was not made a party to the proceedings on the said complaint.

On June 25, 1966, the appellant through one of its partners made an agreement in writing with the respondent whereby it was agreed that the rent would be increased to Shs. 2,300/- a month and that the said complaint would be withdrawn.

Notwithstanding the agreement of June 25, the appellant took no step to withdraw the said complaint. On the contrary the complaint was proceeded with as against Yunis Butchery which took no action to oppose the complaint and in the absence of the respondent who was not made a party to the proceedings upon the said complaint. The appellant did not inform the tribunal of the fact or terms of the agreement of June 25.

The tribunal heard some *ex parte* evidence adduced by the appellant and ordered an independent valuer to inspect the premises and submit a report. This valuer reported his opinion that a fair rent for the premises would be Shs. 1,500/- a month. The tribunal accepted this report and determined the rent at Shs. 1,500/- a month.

The respondent then applied to the tribunal under s. 13 of the Act to have the order determining the rent set aside and for compensation for misrepresentation by the non-disclosure of the agreement of June 25 and for an order for the payment of rent at the rate of Shs. 2,300/- per month as from August 1, 1966, in accordance with the agreement of June 25.

The tribunal held that the respondent knew of the application of June 22 and that the fair rent for the premises was Shs. 1,500/- a month and it refused the respondent's application. The respondent appealed to the resident magistrate's court which allowed the appeal holding that the tribunal had no power to assess a lower rent than that agreed in writing on June 25.

The appellant appealed to this court.

It was quite wrong and unconscionable for the appellant to have allowed the tribunal to proceed with its application of June 22 after the agreement of June 25 without informing the tribunal of that agreement which in fact put an end to the basis of the application of June 22. The application was for relief against a proposed increase of rent from Shs. 2,000/- a month to Shs. 2,900/- a month.

If an application could lie for relief against the rent as increased to Shs. 2,300/- a month by the agreement of June 25 it should have been an application in terms directed to that end or at the very least the tribunal should have been informed of the agreement for a limited increase of rent to Shs. 2,300/- a month and asked to give relief in respect thereof.

However such an application would not lie. Under s. 4 of the Act an agreement in writing for an increase of rent is valid to increase the rent.

Unlike the rent restriction Acts applying to dwelling houses the Act in question in this case does not give a tenant any right to question a rental which he had agreed to pay or an increase of rent which he has agreed in writing to pay. It protects him from having his tenancy determined without proper cause as provided in the Act and provided he takes the prescribed action under s. 6 it protects a tenant from a demand by the landlord for an increase of rent which is excessive, but it does not give the tenant any right to complain against an increase of rent to which he has agreed in writing.

It is true that under s. 12 (4) the tribunal has power to determine the rent, but in our view this power cannot be used otherwise than in an affirmative sense where the rent has been determined by a valid subsisting agreement in writing. In such a case the rent is determined by the agreement.

The appeal is dismissed with costs.

Order accordingly.

For the appellant:

Shaikh Amin

Shaikh Amin, Nairobi

For the respondent:

DN Khanna

Khanna & Co, Nairobi

Patel v Republic
[1968] 1 EA 50 (HCT)

Division:

High Court of Tanzania at Dar-Es-Salaam

Date of judgment: 20 July 1967
Case Number: 667/1967 (10/68)
Before: Biron J
Sourced by: LawAfrica

[1] *Criminal law – Sentence – Alteration of sentence by magistrate after verbally pronouncing sentence but before conclusion of trial proceedings – Whether proper.*

[2] *Criminal law – Sentence – Pending charge against accused – Whether should be taken into account.*

[3] *Criminal law – Sentence – When magistrate is functus officio in regard to the passing of sentence – Criminal Procedure Code (Cap. 60), s. 312 (T.).*

Editor's Summary

The appellant was convicted of being unlawfully in Tanzania without a permit and sentenced to imprisonment for three months. He appealed against the sentence on the grounds that (i) the learned magistrate had no authority to alter his original sentence, which was that of a fine of Shs. 100/- or imprisonment for two months in default; (ii) that even if the magistrate had jurisdiction to alter his sentence, he was not justified in taking into consideration a charge then pending against the appellant and (iii) that the sentence intrinsically was excessive. The evidence showed that the magistrate varied his sentence before the conclusion of the trial proceedings.

Held –

- (i) if the magistrate varied his sentence after having verbally pronounced it but before the conclusion of the trial proceedings he was not functus officio and was in law entitled to vary the sentence; but in any event
- (ii) a pending charge cannot be taken into consideration in passing sentence.

Appeal allowed.

Case referred to:

(1) *H. W. Lovesay v. R.* (1917–18), 7 E.A.L.R. 33.

Judgment

Biron J: The appellant was convicted on his own plea, of being unlawfully in Tanzania without a permit contrary to s. 23 (1) (i) of the Immigration Act 1963, and he was sentenced to imprisonment for three months. He is now appealing from the sentence.

It is common ground that after having been informed by the prosecutor that there was another charge pending against the appellant, the learned magistrate changed his mind and the sentence as imposed was more severe than the one he was originally minded to award.

The three main grounds of appeal as set out in the memorandum of appeal and canvassed by counsel

for the appellant are:

1. That the learned magistrate had no authority or jurisdiction to alter his original sentence, which was that of a fine of Shs. 100/- or imprisonment for two months in default.
2. That even if the magistrate had jurisdiction to alter his sentence he was not justified in taking into consideration a charge then pending against the appellant.
3. That the sentence intrinsically is excessive.

When the appeal first came up for hearing before the learned Chief Justice, it was alleged that the learned magistrate had in fact imposed a sentence of a fine of Shs. 100/- or imprisonment for two months in default, and then on being informed by the prosecutor that there was another charge, that of stealing from a motor vehicle, pending against the appellant, he altered his sentence to that of peremptory imprisonment for three months. The learned Chief Justice thereupon adjourned the case in order to give the magistrate an opportunity of answering the allegation made. The learned magistrate has duly submitted an affidavit, stating, *inter alia*, that he recorded a finding of guilty, and the relevant part of the affidavit then continues (commencing at para. 6):

- “(6) That it was pointed out on behalf of the accused by his advocate, Desai, and I so recorded, that accused had travelled to Tanzania at a time when he heard of the death of his brother-in-law.
- (7) That on this consideration I became minded to impose a fine of 100/- or two months’ imprisonment in default and to recommend his deportation. I put this on record.
- (8) (a) That whilst I was in the process of pronouncing the said sentence and order I was informed by the prosecutor that accused was facing another charge before this court for the offence of stealing from a motor vehicle. This was admitted by the accused and Desai his advocate.
(b) That I did not record this fact because, it not being a previous conviction, I was not instantly sure of the propriety of its being brought in at that stage.
- (9) That I paused to reconsider the sentence that I was then imposing. I held the view that the facts given in mitigation could not stand on their own: accused is deserving of leniency if, as he said, he travelled to Dar-es-Salaam on an emergency and nothing more; it is otherwise if on reaching here he so acted that he became involved in a criminal charge of theft. Every criminal charge of felony carries with it a stigma, however thin.
- (10) That I finally decided that in all the circumstances a term of imprisonment of three months would meet the case and so I imposed this sentence with a recommendation that accused be deported at the end of the term.”

In support of his first submission, that the learned magistrate was not in law entitled to alter his sentence once imposed, counsel for the appellant cited the case of *H. W. Lovesay v. R.* ((1917–18), 7 E.A.L.R. 33), the relevant part of the headnote to which reads:

“A sentence ordering a term of imprisonment to run concurrently with the balance of an existing term cannot be altered by the judge who passed it directing that it should run consecutively.”

In that case the judge had passed a sentence of three years’ rigorous imprisonment to run from the date of the judgment, the appellant at the time undergoing a sentence of eighteen months’ imprisonment. It is not necessary to go into the facts; it is sufficient to quote from the judgment (*ibid.* at p. 34):

“... Ascertaining, however, later that such sentence would in effect be contrary to the provisions of s. 315 of the Criminal Procedure Ordinance which provides that a subsequently imposed sentence of imprisonment shall be consecutive to any sentence that the convict may at the time be undergoing, the learned judge had the appellant again before him and directed that the sentence of three years instead of commencing from the date of judgment should begin to run from the close of the balance of the convict’s existing term of eighteen months.

The practical result of this second order was to increase the term of the imprisonment which but for it would have been undergone by the appellant under the original judgment.”

The judgment continues:

“Section 298 of the Criminal Procedure Ordinance reads as follows:

‘No Court, when it has signed its judgment, shall alter or review the same, except as provided in ss. 313 and 375 or to correct a clerical error;’

the exceptions have no bearing on the present case.”

There is no corresponding provision in our Criminal Procedure Code.

There are numerous authorities as to when a magistrate is *functus officio* so that he cannot alter or vary his judgment, which includes sentence. Apart from the fact, as will subsequently appear, that these cases are not particularly relevant to this instant one, and that, in view of the course I propose to take, any ruling of mine on such aspect could really be no more than *obiter*, and because, as stated by counsel from the bar, the appellant is desirous of returning to Uganda as soon as this case is completed, there being nothing else to defer his departure, I am not, in the circumstances, reserving judgment in order to peruse and refer to these cases.

There is some apparent – and I stress the word apparent – disagreement as to what transpired in the lower court and when the learned magistrate actually altered his judgment. Counsel for the appellant has submitted that the appellant was in fact sentenced to a fine of Shs. 100/- or to imprisonment for two months in default, and then, quoting from his affidavit:

- “4. That after the passing of the above sentence the prosecution commented that the accused is on bail in another criminal case and that he should apply to immigration authority for a pass to remain in Tanzania till the conclusion of that other case.
5. That on hearing the said comments the Hon. resident magistrate changed his mind and on striking (out) of the previous sentence, substituted the sentence of imprisonment for three months.”

In his affidavit the learned magistrate, as noted from the passages quoted, used the expressions “whilst I was in the process of pronouncing the said sentence” and “I paused to reconsider the sentence that I was then imposing” etc. It is not altogether clear at what stage the learned magistrate did change his mind and how far he had gone in pronouncing sentence. It will, I think, have been noted that he stated in his affidavit he had already written out the sentence, although apparently he had not completed pronouncing it. Earlier I used the expression “apparent disagreement”. I did so deliberately as the dispute as to the facts is probably more apparent than real. In his affidavit the magistrate uses the expression that he was in the process of pronouncing sentence when he altered it. As to how far he had gone in actually pronouncing the sentence, it is abundantly clear that he had varied it in the process of pronouncing it. Although, strictly speaking, this is inadmissible as evidence, there is some support for the appellant’s version in the newspaper report as it appeared in “The Standard” of September 2, the headline of the report reading “Magistrate alters Ugandan’s sentence”, and the report goes on to state that the magistrate changed his sentence.

At whatever stage in the pronouncement of sentence the learned magistrate varied it, it is abundantly clear that he did so before the conclusion of the trial proceedings. Section 312 of the Criminal Procedure Code reads:

“Save as hereinafter provided, any person aggrieved by any finding, sentence or order made or passed by a subordinate court other than a subordinate court exercising its extended powers by virtue of an order made under s. 13 of this Code may appeal to the High Court and such subordinate court shall at the time when such finding, sentence or order is made or passed, inform such person of the period of time within which, if he wishes to appeal, he is required to give notice of his intention to appeal and to lodge his petition of appeal.”

The provisions of the section are mandatory, that the magistrate must inform a convicted accused as to his right of appeal. The proceedings are therefore not complete until he has done so. Therefore, even if the magistrate varied his sentence after having verbally pronounced it, he was not functus officio and, in my judgment, was in law entitled to vary the sentence. However, as already indicated, it is not really necessary to rule in law on this aspect in view of my finding on the second ground of appeal raised, which, incidentally, is connected with and covers the third ground.

This third ground is that the sentence is intrinsically excessive. However, as is abundantly clear from the learned magistrate’s own judgment and affidavit, he imposed the heavier sentence on account and because of, the pending charge against the appellant. The crux of the matter, on which the whole of this appeal therefore really depends, is whether the learned magistrate was entitled to take this pending charge into consideration. Counsel for the appellant, in arguing this appeal, has quoted several authorities. I do not think it necessary, and I will be forgiven for not doing so, I hope, to refer to any of them, or to any authority at all, as it is a cardinal principle of our law that a man is presumed innocent until found guilty and convicted by a court of law. Therefore, a pending charge cannot, with all due deference to the learned magistrate, who describes such a pending charge as a stigma, be taken into consideration.

In the circumstances, the appeal must be, and accordingly is, allowed. The sentence of imprisonment for three months imposed by the learned magistrate, which is not supported by the Director of Public Prosecutions, is set aside, and there is substituted therefore the original sentence of a fine of Shs. 100/- or imprisonment for two months in default.

It is, I think, not without interest, if not edification, to note that in this particular case, as I have been informed by counsel for the appellant from the Bar, the charge of theft pending against the appellant was in fact withdrawn by the prosecution on September 22. That in itself, to my mind, underscores the danger of taking a pending charge, of however serious a nature, into consideration in assessing sentence.

In the result, the magistrate’s original sentence, that of a fine of Shs. 100/- or imprisonment for two months in default, is restored, together with his recommendation for deportation.

Appeal allowed.

For the appellant:

KC Desai

KC Desai, Dar-es-Salaam

For the respondent:

DZ Lubuva (State Attorney, Tanzania)

Attorney-General, Tanzania

Virani and another v Collector of Stamp Duties
[1968] 1 EA 54 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 24 November 1967
Case Number: 10/1967 (13/68)
Before: Sir Clement de Lestang V-P, Duffus and Spry JJA
Sourced by: LawAfrica

[1] Stamp Duty – Adjudication – Premium – Rent paid in advance – Lease varied in consideration of payment in lump sum of reduced rent in advance for balance of term – Reversionary lease providing for payment in advance of rent for part of term – Whether “premium” – Stamp Duty Act, ss. 55 and 56 and Sched., Items 11 and 21 (K.).

[2] Stamp Duty – Adjudication – Variation of lease – Deed of variation to reduce rent – Whether “agreement in respect of any letting” and therefore chargeable as a lease – Stamp Duty Act, ss. 55 and 57 and Sched., Item 11 (K.).

Editor’s Summary

The first appellant as landlord leased property by an indenture of lease (“the original lease”) to the second appellant as tenant. Later these parties entered into (1) a deed of variation which was supplemental to the original lease and which reduced the rent payable for the balance of the term in consideration of the payment by the tenant in advance of the whole of such reduced rent in a lump sum. This deed of variation also introduced some additional covenants. The parties also at the same time entered into (2) a reversionary lease for a five year term to commence on the expiration of the original lease. This reversionary lease provided that the rent for the first two years would be Shs. 51,300/- a year to be paid on the signing of the reversionary lease, and for the remaining three years should be Shs. 57,000/- a year payable monthly. The Collector of Stamp Duties assessed the deed of variation as a lease, on the basis that it was an “agreement . . . in respect of any letting” under s. 55 of the Stamp Duty Act; he also decided that the payment of rent in advance both under the deed of variation and under the reversionary lease was a “premium” within s. 57 of that Act, and assessed duty on it accordingly. The assessment by the Collector having been upheld on a case stated to the High Court, this further appeal was taken to the Court of Appeal.

Held –

- (i) the deed of variation was not an “agreement . . . in respect of any letting”, and was not therefore chargeable to stamp duty as a lease;
- (ii) it is an instrument and not a transaction which attracts stamp duty; and in assessing the duty on an instrument the true nature of the instrument must be considered whatever it purports to be, although its form cannot be disregarded;

(iii) on the facts, the payment of rent in advance under the reversionary lease was not a “premium”.
Appeal allowed.

Cases referred to in judgment:

- (1) *King v. Earl Cadogan*, [1915] 3 K.B. 485.
- (2) *Syme v. Commissioner of Stamps* (1910), 29 N.Z.L.R. 975.
- (3) *Hill v. Booth*, [1930] 1 K.B. 381.
- (4) *Agip Ltd. v. Revenue Authority*, [1964] E.A. 13.

November 24, 1967. The following considered judgments were read.

Judgment

Spry JA: This is an appeal from a judgment and decree of the High Court of Kenya on a case stated by the Collector of Stamp Duties. It concerns the duty payable on two instruments. The first was described as a deed of variation and was supplemental to an indenture of lease previously entered into between the two appellants, to which I shall refer as “the original lease”. The main provision of this deed of variation was to reduce the rent payable for the balance of the term of the lease by ten per centum, in consideration of the payment in advance of the whole of such rent as so reduced. Certain additional covenants were also embodied in the lease. The second instrument was a reversionary lease for five years commencing on the expiration of the original lease: I shall refer to this as “the reversionary lease”. This provided that the rent for the first two years should be at the rate of Shs. 51,300/- per annum and should be paid on the signing of the reversionary lease and for the remaining three years should be at the rate of Shs. 57,000/- per annum payable monthly in advance.

The learned judge, upholding the assessment made by the Collector, held that the deed of variation was an “agreement . . . in respect of any letting” within the meaning of s. 55 of the Stamp Duty Act (Cap. 480) and was consequently liable to duty as a lease. Secondly, he held that the provision in the deed of variation for payment in advance in one lump sum of the rent payable under the original lease, as revised, meant that that sum constituted a premium, so as to make the deed of variation chargeable under s. 57 of the Stamp Duty Act. He held also that the rent expressed to be payable in advance in the reversionary lease was a premium and that the reversionary lease accordingly attracted duty on the rent and on the premium under ss. 56 and 57 respectively of the Stamp Duty Act. It is against these three findings that this appeal is brought.

As regards the first finding, counsel for the appellants submitted that if sub-s. (1) of s. 55 of the Stamp Duty Act is read with sub-s. (2), it becomes apparent that the former only relates to agreements made prior to the execution of a formal lease. For myself, I find that conclusion irresistible. I should, in any case, find it difficult to give the words “in respect of any letting” in their context in s. 55 their full ordinary meaning: I think the rule of *noscitur a sociis* must be invoked. I would observe in passing that although it was said that the Stamp Duties Act was taken from the Stamp Duties Act 1954 of New Zealand, s. 55 of the former is expressed differently from s. 117 of the latter and corresponds more nearly with s. 75 of the English Stamp Act 1891, where the words “An agreement . . . with respect to the letting of . . .” are clearly used in a narrow sense.

If the deed of variation is not to be regarded as a lease for the purposes of stamp duty, the question whether the provision for payment in advance of the rent should be regarded as provision for a premium does not, I think, arise, and I will merely remark that if it did arise, I should be inclined to accept counsel for the appellants’ submission that if the original lease contained a genuine agreement for the payment of rent, a subsequent agreement for the payment of future rent in advance as a lump sum could not operate to convert that rent into a premium. I shall later have to deal more fully with the meaning of the word “premium”.

I turn then to the third of the learned judge’s findings, that the payment in advance of the first two years’ rent reserved by the reversionary lease constituted the payment of a premium. On this, counsel for the appellants’ submission was that rent, in modern usage, is payment for the use of land, whereas a

premium is paid as consideration for the grant of a lease. The reversionary lease showed that the amounts payable by the lessee were *prima facie* rent and there was

nothing to displace that presumption. The annual rent for the first two years was less than that for the remaining three, which did not suggest that the former contained any additional element by way of premium. Furthermore, the deed of variation contained a covenant for the repayment of rent paid in advance in the event of the buildings comprised in the original lease being destroyed by fire, and the reversionary lease included, by reference, a similar covenant. A premium, not being linked to the use of the land, is not normally recoverable.

Counsel for the appellants cited *King v. Earl Cadogan* ([1915] 3 K.B. 485) for a definition of a premium. In that case Warrington, L.J. said *ibid.* at p. 492:

“I need not say anything about the meaning of the word ‘rent’, but ‘premium’, as I understand it, used as it frequently is in legal documents, means a cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained . . . It is in fact the purchase-money which the tenant pays for the benefit which he gets under the lease.”

He also relied on the New Zealand case of *Syme v. Commissioner of Stamps* ((1910), 29 N.Z.L.R. 975) in which Edwards, J. said:

“It seems to me clear that here the word ‘premium’ is used as meaning a sum of money paid as the consideration, or part of the consideration, for a lease which under the contract is made payable independently of the continuance of the terms granted by the lease, and to which the incidents of rent reserved by a lease do not attach.”

Reference was made to various other English cases but I do not think they are of any great assistance, particularly as most of them were concerned with the special problems arising out of rent restriction. I would, however, briefly mention one case which was not cited to us, *Hill v. Booth* ([1930] 1 K.B. 381), which brings out clearly that a premium is ordinarily the consideration for the granting of a lease and that the liability to pay a premium, unlike the liability to pay rent, does not cease if the lessee acquires the reversionary interest.

The only East African case that was cited was *Agip Ltd. v. Revenue Authority* ([1964] E.A. 13), a case in the High Court of Uganda. It concerned the grant of a right of way for a term of forty-six years at a rent the whole of which was to be paid in advance, and it was held that this payment was “in substance and in fact a premium”. I think that case was so clearly distinguishable on its facts as to be of no assistance to us.

Counsel for the respondent relied greatly on a statement in Adams’ *Law of Stamp Duties in New Zealand* (3rd Edn.), p. 188, that:

“It may perhaps be stated as a general rule of practice that payments in advance of more than twelve months’ rent are *prima facie* premiums, although they may from the surrounding facts of the case prove to be rent.”

He submitted that in no case that had been cited had an advance payment of more than twelve months’ rent been treated as rent. He was, however, unable to cite any authority establishing or even suggesting that the general rule of practice in New Zealand is founded on any rule of law. In my view, it is far too arbitrary a test.

Two of the basic principles in relation to stamp duty are, I think, first that it is an instrument and not a transaction that attracts duty and, secondly, that in assessing the duty on an instrument, the true nature of the instrument must be considered, whatever it purports to be, although its form cannot be disregarded. Applying those tests to the reversionary lease, there is, on the face

of the instrument, an annual rent reserved and there is no mention of any premium. The only ground for treating any part of that rent as a premium is the fact that two years' rent was to be paid in advance. This involves the fiction that the lease was to be rent free for the first two years, which I can find nothing to justify. The fact that the rent paid in advance was recoverable if the user of the land was interrupted is a very strong argument for saying that it was truly rent and not premium. The fact that the amount of the rent for the first two years was to be slightly less than that reserved under the original lease and less than that reserved in respect of the last three years of the reversionary lease negatives the possibility that the rent payable in advance included an addition by way of premium. The provision that some rent was to be payable in advance was no doubt part of the consideration for the execution of the reversionary lease, but that is a very different matter from saying that the amount so paid in advance was consideration for the execution and not payment for the future use of the land.

For these reasons, I am of the opinion that the learned judge erred in holding that the deed of variation attracted duty under ss. 55 and 57 and item 11 of the Schedule to the Stamp Duty Act and that the reversionary lease attracted duty under ss. 56 and 57 and items 11 and 21 of the Schedule. I would allow the appeal, set aside the judgment and decree and order that there be substituted a decree to the effect that the deed of variation is liable to duty of Shs. 10/- under item 17 of the Schedule to the Stamp Duty Act and that the reversionary lease is liable to duty of Shs. 550/-, based on the average rent over the term of five years, under s. 56 and item 21 of the Schedule. I would order the refund of any duty paid in excess of these amounts and I would allow the appellants their costs in the High Court and in this court.

Sir Clement De Lestang V-P: I have had the advantage of reading in draft the judgment of Spry, J.A. and I entirely agree with his conclusions and the order proposed by him. As Duffus, J.A. also agrees there will be an order in the terms proposed by Spry, J.A.

Duffus JA: I agree with the judgment of Spry, J.A. and with the order that he proposes.

The agreement referred to in sub-s. (1) of s. 55 of the Stamp Duty Act (Cap. 480) must refer to an agreement for the actual letting of the property, and not to a subsequent variation of the terms on which the property had already been let. This is made clear by sub-s. (2) of s. 55 which refers to the stamp duty payable on a lease made subsequently to and in conformity with the agreement under sub-s. (1), and also by the fact that s. 60 makes special provision for the payment of additional duty on any increase of rent made by a subsequent variation of the original lease. I am of the view that the deed of variation in this case is not an agreement for a lease within the meaning of s. 55 and I agree that the stamp duty payable is Shs. 10/- under item 17 of the Schedule to the Act.

Spry, J.A. has dealt fully and adequately with the difference between a premium referred to in s. 57 of the Act and rent. This question arises in this case both under the deed of variation of the original lease and on the new lease. In the deed of variation the parties have in effect compounded the rental due on the expired portion of the lease and the lessor has accepted a lump sum payment of £4,356 for the remaining twenty-two months of the lease in lieu of receiving £4,840 by monthly payments. Here there is no question of a new term being granted, the lease and the obligation to pay rent already exist, and the payment here is clearly a payment of rent in advance and a reduction in the amount of this rent in consideration of the lump sum payment. The same principles apply to the new lease, here the lease itself makes it clear that the

payment is rent for the first two years and that there is a reduction in the rental for these years in consideration of this being a lump sum payment in advance.

Appeal allowed.

For the appellants:

Sir William O'Brien Lindsay

Hamilton Harrison & Mathews, Nairobi

For the respondent:

FP McLoughlin

Attorney-General, Kenya

Soni v Mohan Dairy
[1968] 1 EA 58 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	29 November 1967
Case Number:	13/1967 (182)
Before:	Sir Charles Newbold P, Duffus and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Farrell, J

[1] *Limitation – Deceased defendant – Period for application by plaintiff to add legal representative of deceased as party – Civil Procedure (Revised) Rules 1948, O. 23, r. 4 (3) (K.).*

[2] *Limitation – Revival of suit – Application to revive suit abated by O. 23, r. 4 (3), Civil Procedure (Revised) Rules 1948 – Period for application by plaintiff – Civil Procedure (Revised) Rules 1948, O. 23, r. 8 (2) (K.).*

[3] *Practice – Deceased defendant – Period of limitation for application to add legal representative of deceased as party – Civil Procedure (Revised) Rules 1948, O. 23, r. 4 (3) – Whether administrator ad litem sufficient.*

[4] *Practice – Revival of suit – Period of limitation for application by plaintiff to revive suit under O. 23, r. 8 (2), Civil Procedure (Revised) Rules 1948 (K.).*

Editor's Summary

This case was filed in the resident magistrate's court at Nairobi in August, 1963 by the respondent as a simple claim for milk sold and delivered in 1961. The defendant, however, died in September, 1963

before filing a defence. The appellant was appointed as the legal representative of the defendant in December, 1964. The respondent then applied to revive the suit under O. 23, r. 8 (2) of the Civil Procedure (Revised) Rules 1948. The magistrate dismissed the application holding that the respondent had not shown that “he was prevented by any sufficient cause from continuing the suit” as required by the provisions of that rule. The respondent then appealed to the High Court, which allowed his appeal and revived the suit. The judge held (as had the magistrate) that the period of limitation for the making of an order under r. 8 was three years from the date when the suit abated by reason of r. 4 (3), but that the “sufficient cause” proviso applied, not to that three-year period but to the six-month period after the death of the defendant before the suit automatically abated under that rule. The judge found that there was “sufficient cause” because no legal representative had been appointed within that period. The appellant then brought this appeal to the Court of Appeal. The first question was whether the limitation period of sixty days provided by art. 171 of the Indian Limitation Act 1877 or the general period of three years under art. 178 applied to the application. The second question was whether the respondent had to show, and if so whether he had shown, “sufficient cause”.

Held – (by Duffus and Law, JJ.A., Newbold, P. dissenting):

- (i) the period of limitation for an application by a plaintiff under O. 23, r. 8 (2) of the Civil Procedure (Revised) Rules 1948 for an order reviving a suit is given by art. 178 of the Indian Limitation Act 1877 and is three years from the date of the abatement of the suit (obiter dicta of Duffus, J.A. in *Mehta v. Shah* (1) discussed);
- (ii) the proviso to O. 23, r. 8 (2) applies to prevention by sufficient cause during the six month period following the death of the defendant before a suit abates under O. 23, r. 4 (2) and during which an application must be made to join his legal representatives;
- (iii) during that six month period the respondent could have applied to have an administrator ad litem appointed under s. 38 of the Indian Probate and Administration Act 1881; and an administrator ad litem would have been a “legal representative” within O. 23, r. 4;
- (iv) but such an application under s. 38 could only be granted if the executor or person entitled to administration was unable or unwilling to act; and there was no suggestion of that in this case;
- (v) it was not unreasonable for the respondent to wait, at any rate for six months, to allow the person entitled to administration time to apply for it;
- (vi) therefore in the circumstances the respondent had shown sufficient cause for not continuing with the suit and the court below was right to revive it.

Observation by Law, J.A. obiter: It may be that different periods of limitation apply to an application to revive a suit made by a plaintiff in person and to an application by the legal representative of a deceased plaintiff or the trustee or official receiver of a bankrupt plaintiff.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Mehta v. Shah*, [1965] E.A. 321.
- (2) *Brij Indar Singh v. Kanshi Ram* (1917), 44 I.A. 218.
- (3) *Patton Bethune v. Jethabhai* (Civil Case No. 383 of 1952, unreported).
- (4) *Sarat Chandra v. Maihar Stone and Lime Co.* (1922), 49 Cal. 62.

November 29, 1967. The following considered judgments were read:

Judgment

Duffus JA: This case started in the resident magistrate’s court on August 22, 1963 as a simple claim to recover Shs. 925/05 due for milk sold and delivered in the year 1961. The defendant entered an appearance, but died, before filing his defence, on September 29, 1963.

It is agreed that O. 23 of the Civil Procedure (Revised) Rules 1948 applied and that the cause of action survived, and it is further agreed that an application should have been made to the court under r. 4 of that Order to appoint the legal representative of the deceased as a party to the suit and further that, as no application was made within the time limited by law, the suit abated as against the deceased defendant

by virtue of r. 4 (3). It is also common ground that the period of limitation in this case is six months from the date of the death of the deceased defendant in accordance with the provisions of art. 175C of the Indian Limitation Act of 1877. The appellant was appointed the legal representative of the deceased defendant. The exact date of his grant has not been established but the resident magistrate, in his ruling, assumed that this was on or about December 8, 1964. An application was then made by the plaintiff/respondent to the resident magistrate under the provisions of r. 8 (2)

of O. 23 for an order to revive the suit. This is the matter now before this court on appeal. The resident magistrate refused the application on the ground that the plaintiff/applicant had failed to satisfy him that "he was prevented by any sufficient cause from continuing the suit" as required by r. 8 (2). On appeal to the High Court, the appeal was allowed and the order of the resident magistrate dismissing the application set aside. The High Court ordered that the suit be revived and that the appellant as the legal representative of the deceased defendant be made a party to the suit.

In his judgment the learned judge held: (1) that the period of limitation for the making of an order under r. 8 was three years from the date when the suit abated by reason of r. 4 (3). The resident magistrate had also found that this was the period of limitation; (2) that the words "if it is proved that he was prevented by any sufficient cause from continuing the suit" applied to the six months period after the death of the defendant and before the suit automatically abated and not to the three year period of limitation following after the abatement commenced. He held that the resident magistrate had found that it was impossible for the plaintiff to have applied to substitute the legal representative of the deceased defendant during this period as none had been appointed, and that accordingly the resident magistrate should have granted the application.

Special leave had to be sought and was duly granted under s. 74 of the Civil Procedure Act for the appeal to be brought to this court as the value of the subject matter of the original suit did not exceed Shs. 1,000/-.

Counsel for the appellant argued the appeal on two main points of law. First he submitted that the correct period of limitation was that prescribed by art. 171 of the Indian Limitation Act, that is, sixty days from the date of the abatement of the suit; and secondly that the High Court was wrong in reversing the resident magistrate's decision that the plaintiff applicant had not proved to his satisfaction that he was prevented by any sufficient cause from continuing the suit. Counsel had a third ground to the effect that the learned judge had decided the appeal on a point not raised or argued before him and without allowing the appellant an opportunity of contesting the case on that point, but this point was eventually abandoned by counsel and need not be considered further.

It is agreed that the cause of action survived on the death of the defendant and that O. 23, r. 4 then governed the position. Rule 4 reads as follows:

- "4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or a sole surviving defendant dies and cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- (3) Where within the time limited by law no application is made under sub-r. (1), the suit shall abate as against the deceased defendant."

If the suit abates as provided by r. 4 (3) then r. 8 would apply and this states:

- "8. (1) Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.
- (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was

prevented by

any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”

By virtue of the proviso to s. 41 of the Limitation Act (Cap. 11 of the 1948 Edition of the Laws of Kenya) the provisions of the Indian Limitation Act of 1877 still apply to proceedings under O. 23 of our Civil Procedure Rules, and the question is whether the specific provisions of art. 171 or the general provisions of art. 178 should be applied in this case. For convenience, I would here set out the provisions of these articles:

“Article 171. Under s. 371 of the Code of Civil Procedure or under that section and s. 582, for an order to set aside an order for abatement or dismissal; sixty days from the date of the order for abatement or dismissal.”

and

“Article 178. Application for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, s. 230: three years from the date when the right to apply accrues.”

The parties have agreed that the period of limitation to be applied under r. 4 (3) of O. 23 would be six months after the death of the deceased as provided by art. 175c of the Indian Limitation Act, the relevant portion of which reads:

“Article 175c. Under s. 368 of the Code of Civil Procedure, to have the legal representative of a deceased defendant made defendant, . . . six months from the date of the death of the deceased defendant . . .”

The law and the principles under which the provisions of the Indian Limitation Act of 1877 are applied to our Civil Procedure Rules have been fully examined and explained by this Court in the case of *Mehta v. Shah* ([1965] E.A. 321) but I would again shortly summarize the position. Kenya has its own Limitation Act (Cap. 11 of the 1948 (Revised) Laws). Section 41 of that Act repealed the Indian Limitation Act of 1877 which had formerly applied to Kenya but saved those provisions specifying the period of limitation in respect of any matter not provided for by legislation in Kenya. The 1882 Indian Code of Civil Procedure also formerly applied to Kenya until replaced by the Civil Procedure Ordinance (3 of 1924) but s. 106 of our Ordinance especially provided:

“ ‘In every enactment or notification passed or issued before the commencement of this Ordinance in which reference is made to, or to any chapter or section of the Indian Code of Civil Procedure of 1882, or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Ordinance or its corresponding Part, Order, section or rule’ .”

This section was omitted in the Civil Procedure Code (5) of the 1948 Edition, but in *Mehta v. Shah* (*supra*) this court held that s. 106 was still law and should be applied in the interpretation of our Civil Procedure Act.

In his leading judgment in *Mehta v. Shah*, Spry, J.A. explained how this should apply. He said [1965] E.A. at p. 325:

“I should perhaps add, to obviate any doubt, that in my view, where any rule of the Revised Rules corresponds with a section of the 1882 Code and it is practicable to read references to the latter in any enactment passed before the commencement of the Civil Procedure Ordinance as references to the former, it is obligatory to do so and it is immaterial whether or not the effect of the rule is similar to that of the section.”

In my judgment in the same case I also pointed out that the provisions of s. 23 (2) of the Interpretation and General Provisions Act (chap. 2) and s. 4 of the Indian

Acts (Amendments) Ordinance (Cap. 2 of the 1948 Laws) also applied. But in so far as this case is concerned, the main consideration on this point is whether r. 8 of O. 23 corresponds with any of the provisions of the Indian Civil Code of 1882 and whether it is practicable to extend the provisions of the Indian Limitation Act of 1877 which applied to those sections to r. 8.

In his judgment Farrell, J. considered this question and said:

“The learned J.A. had previously held that the Indian Limitation Act 1877, was such an ‘enactment’, and it is clear that O. 23, r. 8 of the Revised Rules ‘corresponds’ with s. 371 of the 1882 Code, though worded differently. The question then is whether it is practicable to read the reference in art. 171 of the 1877 Act as a reference to O. 23, r. 8. In the case cited there was no difficulty in reading the reference in art. 175a to s. 365 of the Code as a reference to O. 23, r. 3 (1) since the article defined the application merely by reference to the section and specified a period ascertainable by reference to the death of the plaintiff. But art. 171, in addition to mentioning the section, defines the application as one ‘for an order to set aside an order for abatement or dismissal’, and specifies the period by reference to ‘the date of the order for abatement or dismissal’. Under r. 4 (3) there is no order for abatement, but abatement is automatic. Can it then be said that it is practicable to read the reference to the section as a reference to the corresponding rule? In my view it is not; and I am fortified in this opinion by the passage in the judgment of Duffus, J.A., at p. 335A in the same report in which he expresses the view (admittedly obiter) that ‘this period of a sixty day limitation could hardly be applied to applications under O. 23, r. 8 as at present no order for abatement is made. It does appear, therefore, that the period of limitation for applications under r. 8 would at the present time be three years under art. 178 and not as before, sixty days under art. 171’.”

It is to be noted that Farrell, J. supports his view from a reference to my judgment in *Mehta v. Shah* ([1965] E.A. 321). There can be no doubt that my reference there to the period of limitation applicable to r. 8 was clearly obiter and of no binding effect.

Counsel for the appellant, in support of his argument that art. 171 with its sixty days limitation should apply, agreed with the learned judge’s finding that s. 371 of the former Indian Code of Civil Procedure corresponded with our r. 8, but he submitted that the judge fell into error in holding that it would not be practicable to regard the reference in art. 171 as a reference to O. 23, r. 8. Counsel for the respondent, however, submitted that the judge was wrong in holding that s. 371 corresponded with r. 8 and in any event he also supported the judge’s finding that it would not be practicable to read the reference in art. 171 as a reference to r. 8.

It is necessary to consider in detail the provisions of the 1882 Indian Code of Civil Procedure as compared with our existing Civil Procedure Rules. Order 23 of our rules and Part II, chap. 21 of the 1882 Indian Code of Civil Procedure both deal with the subject of the death, marriage and insolvency of any of the parties. Counsel for the appellant points out that the provisions of these two enactments follow the same pattern in both cases, thus he submits that r. 1 is the same as s. 361; r. 2 the same as s. 362; r. 3 (1) (2) corresponds with ss. 363, 365 and 366; r. 4 corresponds with s. 368; r. 5 with s. 367; r. 6 with s. 369; r. 7 with s. 370; and then our r. 8, under which this application is made, corresponds with s. 371; while r. 9 corresponds with s. 372.

There can be no doubt that O. 23 has been based on the provisions of chap. 21 of the Indian Code of Civil Procedure of 1882 and that the various periods of limitation set out by the Indian Limitation Act should apply. It is also a fact

that r. 8 also appears to be intended to take the place of s. 371 and to deal with the effect of the abatement or dismissal of a suit. It is also a fact, however, that the provisions of r. 8 would also appear to include the power of setting aside an abatement formerly given to the court under s. 368 of the 1882 Indian Code of Civil Procedure. Section 368 reads as follows:

“368. If there be more defendants than one and any of them die before decree and the right to sue does not survive against the surviving defendant or defendants alone, and also in case of the death of a sole defendant, or sole surviving defendant where the right to sue survives, the plaintiff may make an application to the court, specifying the name, description and place of abode of any person whom he alleges to be the legal representative of the deceased defendant, and whom he desires to be made the defendant in his stead.

The court shall thereupon enter the name of such representative on the record in the place of such defendant, and shall issue a summons to such representative to appear on a day to be therein mentioned to defend the suit; and the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant and had been a party to the former proceedings in the suit:

Provided that the person so made defendant may object that he is not the legal representative of the deceased defendant, or may make any defence appropriate to his character as such representative.

When the plaintiff fails to make such application within the period prescribed therefore, the suit shall abate, unless he satisfies the court that he had sufficient cause for not making the application within such period.”

The last paragraph of the section provides for the abatement of the suit. This would appear to have been an automatic abatement and not one which required the order of the court. I have had some difficulty in tracing what was the position in India prior to the bringing into force of the new Civil Procedure Code of 1908, but apparently the practice was to obtain an order of the court specifically ordering the abatement of the suit. There is a reference to this effect in the A.I.R. Commentaries on the Code of Civil Procedure (5th Edn.), Vol. 2, note 17 to O. 22, r. 4, p. 2695) and the case referred to is *Brij Indar Singh v. Kanshi Ram* ((1917), 44 I.A. 218). In that case both the plaintiff and one of the defendants had died and application had been made under s. 366 and under s. 368 for the order of the court to abate the suit. The material part of the judgment of the Privy Council in so far as it affects this case is that their lordships stressed the necessity for an order of the court to abate the suit being made on notice to the plaintiff. In any event whether the abatement took place automatically at the end of the period of limitation, that is six months after the death of the defendant, or whether the suit only abated on an order of the court, the important point here is that the plaintiff had, acting in his own right as plaintiff, to rely on the provisions of s. 368 in order to continue the suit against the legal representative of the deceased defendant, and not on the provisions of s. 371. The provisions of s. 371 did not apply to a plaintiff who was alive and solvent but only to the legal representative of a dead, bankrupt, or insolvent plaintiff. The plaintiff in this case is, according to the record, still alive and not bankrupt, so, prior to the 1924 legislation, his application to revive or continue the suit would have been made under the provisions of s. 368. Counsel for the respondent submitted that the application to appoint the legal representative of the deceased defendant was made under the inherent powers of the court in order to prevent any injustice or an abuse of the process of the court. I am of the view though that the provisions of s. 368 implied a right for a plaintiff to

apply for and for the court to grant, an application setting aside an abatement and substituting the legal representative of the deceased defendant.

The question then would be: what was the period of limitation that applied to an application of this nature? I think it must be accepted that there was a period of limitation and that such a period would be either the specific period of limitation under one of the articles of the 1877 Limitation Act or else that the general provisions of art. 178 applied. The answer here must be that art. 171 did not apply as it only applied to applications under s. 371; and art. 175c did not apply as that only applied to the first period of limitation with regard to an application to substitute the legal representative of a deceased defendant under s. 368; and that there was no other specific provision that could apply so that recourse must be had to the general provisions of art. 178 and that the period of limitation was therefore three years after the right to apply first accrued.

Rule 8 (2) of O. 23, in my view, gives the plaintiff the rights that were formerly given both by the provisions of s. 368 and of s. 371 of the 1882 Indian Code of Civil Procedure. Rule 8 (2), therefore, corresponded with a part of s. 368 and with s. 371. The word “corresponding” in s. 106 of the 1924 Civil Procedure Ordinance must in my view mean such section or sections in the new ordinance that took the place of those sections in the 1882 Indian Code of Civil Procedure, in the sense that both sections dealt with substantially the same matters. Section 368 provided for cases where the defendant had died and allowed the plaintiff to apply to continue the suit against the legal representatives of the deceased defendant, while s. 371 (2) was not available to a plaintiff in person, but only to the legal representative of the deceased, bankrupt or insolvent plaintiff and could be used when the suit had abated either due to the death or insolvency of the plaintiff as well as to the death of the defendant.

Counsel for the respondent also submitted that s. 371 was only to be used for applications arising out of a change in the status of the plaintiff and did not apply to the applications arising from the death of a defendant. Here again the position is not clear, but clearly it applied only to applications by the legal representative of a dead, bankrupt or insolvent plaintiff. In the case of *Singh v. Kanshi Ram* ((1917), 44 I.A. 218), the Privy Council also decided that it could be used where an application was made under s. 368 in the case of the death of the defendant, but in that case the plaintiff had also died so the application was being made by the legal representative of the deceased plaintiff and not, as in this case, by the plaintiff in his own capacity.

In arriving at the period of limitation applicable to r. 8 (2) there would be three alternatives, that is to apply such limitations as would have formerly applied so that the limitation in this case which is equivalent to an application by plaintiff under s. 368 would have been, in my view, three years under art. 178, whilst if the application had been made by the legal representative of a deceased plaintiff the limitation would be under art. 171, and would be within sixty days from the abatement. The second and third alternatives would be to apply to the whole section either the specific limitation of sixty days under art. 171, or the general limitation of three years under art. 178.

I would at this stage consider the reasons given by Farrell, J. in arriving at the conclusion that the limitation was that provided by art. 178 and not art. 171. It is to be noted that the question which I have discussed at length as to whether an application to revive a suit had to be made under s. 368 and as to whether this also corresponded with r. 8 (2) was not argued or considered before the learned trial judge, but this question has now been fully and ably argued by learned counsel.

Farrell, J. was of the view that r. 8 (2) and s. 371 corresponded but that it would not be practicable to

read the reference in art. 171 as a reference to

O. 23, r. 8. I have set out that part of his judgment relevant to this issue. The learned judge was influenced in his decision by the reason that art. 171 defines the application as one “for an order to set aside the order for abatement or dismissal” and also that the period of limitation was calculated sixty days from the date of the “order of the abatement or dismissal” and as he points out the abatement under r. 4 (3) which took the place of s. 368 is now automatic and does not need an application or an order. This was a reason which also influenced Mayers, J. in his obiter opinion re the limitation to be applied to r. 8 in Civil Case No. 383 of 1952, *Patton Bethune v. Jethabhai* and also my obiter opinion in *Mehta v. Shah* ([1965] E.A. 321). There is of course a considerable difference between an abatement which follows automatically and one which is only made on application to the court. First there is the question of notice to the other party, an automatic abatement follows automatically without any proceedings or notice to the parties. It is quite possible for a plaintiff to be in complete ignorance of a defendant’s death, especially having regard to the long delays that used to take place in the bringing of a case to trial, and also having regard to the fact that an expatriate defendant might be absent from Kenya in Asia or Europe for long periods without the plaintiff’s knowledge. The position is quite different if a court order is necessary. In the case of *Singh v. Kanshi Ram* ((1917), 44 I.A. 218), the Privy Council pointed out that an order of abatement was really tantamount to judgment in favour of the defendant and that such an order should never be made *ex parte*. In delivering the judgment of the court Lord Dunedin said:

“An order abating the suit, looking to the terms of s. 371 already quoted, may be said to be really tantamount to a judgment in favour of the defendant. To pronounce such a judgment *ex parte*, when no notice has been given to the opposite side to appear and contest the order, is much the same as to decide a suit against a defendant who has not been cited to appear. The practice if it is a practice, is quite indefensible.”

The plaintiff would then know of the defendant’s death and have the opportunity of appearing and contesting the application for abatement and this is an entirely different position from an automatic abatement where the plaintiff might suddenly find himself bereft of his rights without even having had knowledge of the defendant’s death or an opportunity of applying to continue the suit against his legal representative.

Article 171 defines the time limit as sixty days from the date of the order, a comparatively short period, but understandable if the plaintiff knew of the defendant’s death and of the application to abate and had ample opportunity to apply to set this aside; but it would certainly be unreasonable and in my view impracticable to apply this same period of limitation to an automatic abatement calculated where the limitation would be first a period of six months, and then a further sixty days as from the date of the death of the defendant, a fact which could have occurred without the knowledge of the plaintiff who is now to be deprived of a vested right. The position is different when it is the plaintiff who dies, and where clearly his representatives should know of the existing suit, and of the necessity of having themselves substituted in order to continue the suit.

There is a further consideration. If the reference in art. 171 to s. 371 was taken to be a reference to O. 23, r. 8 (2) then the position would be that art. 171 would read as follows:

“Under O. 23, r. 8 (2) of the Civil Procedure Rules . . . for an order to set aside an abatement or dismissal; sixty days from the date of the abatement or dismissal.”

In order to arrive at this interpretation the court would have to apply the provisions of s. 4 of Indian Acts (Amendments) Ordinance, Cap. 2 of the 1948 Edition of the Laws of Kenya, which reads:

“ ‘4. Where any Indian Act is applied to the Colony such Act shall be read with such formal alterations as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to make the same applicable to the circumstances.’ ”

There would have to be a very substantial alteration to art. 171 for this limitation to be applied. It would mean the deletion of the reference to an “order” for abatement and this would be a material change which would in all likelihood give an entirely different period of limitation to that existing before. I am of the view that this would not be such a formal alteration as would be authorised by s. 4.

In my view the decision in *Mehta v. Shah* ([1965] E.A. 321), does not affect the position in this case. That case is concerned with the limitation applicable to O. 23, r. 3. The considerations that applied to r. 3 and to the application of arts. 175A and 175B are quite different from the considerations in this case.

There is a similarity in both cases in that both r. 3 and r. 8 can each be said to correspond to two different sections in the Indian Civil Procedure Code of 1882, but the two sections in *Mehta v. Shah* (*supra*) ss. 365 and 366, both had by virtue of arts. 175a and 175b of the Indian Limitation Act 1877 exactly the same period of limitation in each case, that was six months from the death of the deceased plaintiff: but the position is different in this case, in that the period of limitation that applied to that portion of s. 368 under which this application would have been made, was in my opinion that under art. 178, of three years from the date that the right to apply accrued; whilst the period of limitation that applied to s. 371 was, by virtue of art. 171, sixty days from the date of the order of abatement; here are two entirely different periods calculated as from two different occurrences. Another very material difference would be the difficulty that occurs in the application of art. 171 to r. 8. The two important factors in any period of limitation are the occurrence or event from which time starts to run, and the period of time. As I have pointed out, art. 171, read without amendment, would be meaningless and cannot be applied to an abatement under r. 8 as now there is no order of abatement which is the occurrence from which time starts to run under art. 171. As I have already pointed out, art. 171 could only apply to r. 8 with a very material change to the provisions of the section, a change which in my opinion could not be made. I am, therefore, of the view that the learned judge was correct in holding that the limitation applicable to an application under r. 8 is that given by art. 178.

There remains the interpretation of the words “If it is proved that he was prevented by any sufficient cause from continuing the suit.” The learned judge held that this proviso applied to the six months period following the death of the defendant and before the suit abated. He said:

“Founding myself solely on the provisions of our O. 23, it seems to me that the words ‘continuing the suit’ in r. 8 (2) relate back to the words ‘shall proceed with the suit’ at the end of the r. 3 (1) and r. 4 (1) as may be appropriate. It would, in my view, be an absurdity to apply a fixed period of limitation to applications under r. 8 (2) whether that period is sixty days or three years, and at the same time impose on the applicant the burden of proving that he was prevented from making his application at an earlier time within the period.”

I understood counsel for the appellant to concede that this statement of the law was correct. I entirely agree with the learned judge’s interpretation of these

words. I also agree that it is for the court to whom the application is made, in this case the resident magistrate, to decide whether the plaintiff/applicant had proved sufficient cause for not continuing the suit. The resident magistrate gave a carefully considered ruling on the application in writing and it is quite apparent that, in arriving at his conclusion that the plaintiff had failed to prove sufficient cause, he took into account the delay that had occurred after the suit had abated.

The learned judge found that the plaintiff had sufficiently discharged the onus of proof, as the magistrate had found that it would have been impossible for the plaintiff to have applied to the court to join the legal representative of the defendant as a party within the six months period as the appointment had been made well over a year after the defendant's death.

The learned judge also found that "the fact that the plaintiff could have taken steps to have had an administrator ad litem appointed in order to continue the suit" was not relevant, as r. 4 (1) does not appear to contemplate the substitution of any person other than the "legal representative" of the deceased defendant. With respect, I cannot agree. In my view the plaintiff could have taken steps to have an administrator ad litem appointed by virtue of the provisions of s. 38 of the Indian Probate and Administration Act 1881 and such an administrator would be a "legal representative" within the meaning of r. 4; he would be the legal representative appointed by the court for the specific purpose of representing the defendant in that suit.

The question then would be whether Farrell, J. was justified in his finding that the plaintiff/applicant had sufficiently established good cause for not proceeding with the suit; or if it would now be necessary to send this application back to the resident magistrate to determine this issue. It is a fact that the plaintiff could not proceed with the suit until a legal representative for the defendant was appointed. An application under s. 38 of the Indian Probate and Administration Act would only be granted if the executor or person entitled to administration is unable or unwilling to act. There is no suggestion in these proceedings that the legal representative, the appellant, Dhirajlal Ratilal Soni, was unable or unwilling to act, and apparently there was never any question of an application being made for the appointment of an administrator ad litem. The plaintiff clearly could not proceed with his suit until a legal representative was appointed and substituted and I do not consider it unreasonable for him to have waited, at any rate for six months, so as to allow the person entitled to administration time within which to apply for administration. In these circumstances I am of the view that the resident magistrate on a proper direction must have come to the conclusion that the plaintiff had good cause for not continuing the suit, and I am of the view therefore that the learned judge was correct in also coming to this conclusion.

I would therefore dismiss this appeal and order that the respondent be paid the costs of this appeal and allow a certificate for two advocates.

Sir Charles Newbold P: The facts relevant to this appeal are set out in the judgment of Duffus, J.A. and I find it unnecessary to re-state them.

Two main issues arise on the appeal. The first is whether, where a suit has abated under O. 23, r. 4, of the Kenya Civil Procedure Rules by reason of the death of a defendant, the application made to revive the suit under O. 23, r. 8, of those Rules must be made within the time specified in art. 171 of the Indian Limitation Act 1877, or within the time specified in art. 178 of that Act. The second is whether, if the period of limitation is that specified in art. 178, the plaintiff applying has to show, by reason of O. 23, r. 8 (2), that "he was prevented by any sufficient cause from continuing the suit"; and, if so, whether the plaintiff on the facts of this case has shown such sufficient cause.

I should like to say that I have received the greatest assistance from the able arguments of counsel for the appellant (who was the defendant in the suit) and counsel for the respondent (who was the plaintiff in the suit). During their arguments my mind fluctuated from side to side as there is a great deal to be said on each side and the arguments on each side were presented with force and clarity.

Dealing with the first issue, both counsel referred to the decision of this court in *Mehta v. Shah* ([1965] E.A. 321), and neither challenged the authority of that case. Nor is it in dispute that the ratio decidendi in that case was that if any rule of the Kenya Civil Procedure Rules corresponds with a section of the Indian Code of Civil Procedure 1882, then, in the absence of a specific period of limitation set out in Kenya legislation, the period of limitation applicable to that rule is the period of limitation set out in the Indian Limitation Act 1887, in relation to the corresponding section of the Indian Code unless it is impracticable to read the reference in the Indian Limitation Act to the section of the Indian Code as a reference to the particular rule in the Kenya Civil Procedure Rules. That being the legal position, counsel for the appellant submits that O. 23, r. 8 corresponds to s. 371 of the Indian Code of Civil Procedure and that, accordingly, art. 171 of the Indian Limitation Act applies; with the result that any application for revival of the suit must be brought within sixty days from the abatement. Counsel for the respondent, on the other hand, submits that O. 23, r. 8, does not correspond with s. 371 and, accordingly, that the residual provision contained in art. 178 of the Indian Limitation Act applies; with the result that the application for revival of the suit must be brought within three years from the abatement. I have come to the conclusion that the decision in this matter should be arrived at as a result of a broad view of the legislation and not as a result of a detailed examination of fossilised foreign legislation applied as it existed nearly one hundred years ago. To approach the matter from the latter point of view would, in my opinion, create a real danger of applying to a different people living in a different continent in a different age foreign petrified shackles which have ceased to exist in their applied petrified form in their country of origin. The courts should never forget the provisions of s. 3 of the Judicature Act 1967, which makes the circumstances of Kenya and its inhabitants the paramount consideration in any case which brings into question applied law.

It is urged that O. 23, r. 8 does not correspond with s. 371 of the Indian Code for two reasons. First, that s. 371 refers to an order for abatement whereas O. 23, r. 8 refers merely to a suit abating, a position which happens automatically and without an order of the court by reason of the provisions of O. 23, r. 4 (3). Secondly, that s. 371 refers to an application by “the legal representative of the deceased or bankrupt or insolvent plaintiff” and not to one by the plaintiff himself, whereas O. 23, r. 8, refers to both applications by the plaintiff himself and by his legal representative. In *Mehta v. Shah* (*supra*) Spry, J.A. said at p. 325 that in determining whether a rule of the Kenya Civil Procedure Rules corresponded with a section of the Indian Code “it is immaterial whether or not the effect of the rule is similar to that of the section”. I agree with him. I cannot see why a reference to an order of abatement instead of merely a reference to abatement would have the result of making the section and the rule cease to correspond. The trial judge did not consider that it had that effect – he considered that the absence of an order made it impracticable to apply the section. Duffus, J.A., in a passage in *Mehta v. Shah* which is clearly obiter, seemed to consider that the difference between automatic abatement and an order for abatement resulted in the rule and the section not corresponding. With the greatest respect to his view, I cannot see any good reason for it, the more especially as it seems to be at variance with his judgment that another rule

which referred to an automatic abatement corresponded with an amalgam of two sections, one of which contained a reference to an order for abatement. While there are differences there is no doubt that when the position is looked at as a whole, O. 23, r. 8, corresponds with s. 371 in precisely the same way that this court in *Mehta v. Shah* (*supra*) held that O. 23, r. 3, corresponded with s. 365 of the Indian Code. This being so I see no more practical difficulty in reading the reference in art. 171 to s. 371 as a reference to O. 23, r. 8, than this court saw in *Mehta's* case in reading the reference in art. 175a to s. 365 as a reference to O. 23, r. 3 (1). There is absolutely no practical difficulty in having the limitation period run from the date of the automatic abatement instead of from the date of the order for abatement. In each case the limitation period relates to the period of abatement and it matters not the procedural means whereby the abatement came into existence.

Counsel for the respondent's second reason for saying that s. 371 and O. 23, r. 8 do not correspond raises much more difficult problems. He stressed that a rule which gives a right to a plaintiff cannot correspond with a section which gives no right in any form to a plaintiff. There is obvious force in this argument, though I think that in any event, as O. 23, r. 8, deals generally with the effect of abatement under all the rules of O. 23, I would have construed the limitation in art. 171 relating to abatement as applicable to O. 23, r. 8. I am however relieved of any difficulty in this respect by reason of the decision of the Privy Council in *Brij Indar Singh v. Kanshi Ram* ((1917), 44 I.A. 218). In that case it was held that s. 371 applied to a plaintiff as well as to his legal representatives. Lord Dunedin delivering the judgment of the Board said (*ibid.* at p. 227):

"Then comes s. 371, which primarily deals with what abatement involves: 'No fresh suit shall be brought on the same cause of action'. It is obvious that it is only a plaintiff that is hurt by this. Nothing could be better for a defendant. It is also obvious that an abatement is equally hurtful to the plaintiff whether granted in respect of a failure under s. 366 or s. 368. When s. 371 goes on to say under what conditions the plaintiff can get rid of the abatement, it would be expected that it would deal with abatement however procured. And the opening words make it clear that it is so: 'When a suit abates or is dismissed *under this chapter*'. This chapter includes s. 368 just as much as s. 366."

Thus the law of India was that the reference to s. 371 in art. 171, was to be construed as a reference to both s. 368, which gave a right to the plaintiff, and to s. 371, which gave a right to the plaintiff's legal representative. As O. 23, r. 8 is an amalgam of ss. 368 and 371 there is thus every reason to treat the reference to s. 371 in art. 171 as a reference to O. 23, r. 8.

I am the more fortified in this view by the results which follow should counsel for the respondent's submissions be correct. It is a matter of public policy to which the courts have long given effects that there should be an end to litigation. The abatement of the suit does not arise until six months after the event which gave rise to the abatement. It would be wholly disproportionate to permit a suit which has been abated to be revived up to three years after the abatement. Not merely that! As the suit itself may be brought within the appropriate period of limitation, if to that period is added the period of abatement and then the period in which the suit may be revived, one arrives at a period of many years in which it will be unknown not merely what is the decision in an action but whether an action is in existence. If to that period is then added the not inconsiderable period which may ensue before the action is finally determined the plaintiff to an action may, if all goes well and the event which gives rise to the action occurred when he was reasonably young and he lives to a reasonable old age, live to see the result of his action. Unfortunately the

defendant would not be in that happy position as he would already have died. A further result which follows should counsel for the respondent's submissions be correct is that an application to set aside an abatement may, if the applicant is a plaintiff, be made within three years of the abatement, but if the applicant is a legal representative of a plaintiff it has to be made within sixty days of the abatement. If there is to be a differential I should have expected precisely the reverse position since a plaintiff, being more conversant with his affairs, should obviously have less time than his representative to set aside a default.

This case is an example of the inordinate delay which will occur. Over six years ago it is alleged that milk to the value of less than £50 was sold and delivered but not paid for; and until this court gives its decision it will not be known whether the action is in existence, far less the result of the action. Such a position is intolerable and completely contrary to the basic policy of the law and the needs of the people of Kenya. Such a position should not, and in my view does not, exist.

I am satisfied that art. 171 applies and that as the application to set aside the abatement was not brought within sixty days of the abatement, which, of course, it could have been by the appointment of an administrator ad litem, the suit cannot now be revived. I would therefore allow the appeal.

Having arrived at that decision it is unnecessary to consider the second main issue, that is whether the plaintiff has to show, and has shown, sufficient cause. As, however, the matter was fully argued I think I should state that I agree with the views of Duffus, J.A. and Law, J.A. on this point.

The other members of the court, though differing between themselves as to whether there is a differential between a plaintiff and his legal representative, are of a different view from me on the first issue; accordingly, there will be an order in the terms proposed by Duffus, J.A.

Law JA: I have had the advantage of reading in draft the judgment prepared by Duffus, J.A., with which I am in substantial agreement. I would only add a few words to make it clear that in my view the decision in this case does not involve any departure from the principles laid down in *Mehta v. Shah* ([1965] E.A. 321). By O. 23, r. 8 (2) of the Kenya Civil Procedure (Revised) Rules 1948, the right to apply for an order to revive a suit which has abated is given to "the plaintiff, or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff". This right was not conferred on a plaintiff in his capacity as such by s. 371 of the Indian Code of Civil Procedure of 1882, but arose out of the last paragraph of s. 368 of that Code. It follows then that O. 23, r. 8 (2) of the Kenya Civil Procedure Rules corresponds not only with s. 371 of the Indian Code, as counsel for the appellant submits, but with part of s. 368 of that Code as well. Article 171 of the Indian Limitation Act of 1877 applied in India to s. 371 of the Indian Code, that is to say to applications by legal representatives of a deceased plaintiff or the trustee or official receiver of a bankrupt plaintiff, but not specifically to applications by a plaintiff as such. Furthermore, art. 171 applied in terms to applications to set aside an order for abatement. The practice in India, when a plaintiff failed to apply in time to implead the legal representative of a deceased defendant, was as Duffus, J.A. has pointed out for an order for abatement to be obtained, under s. 368, after notice to the plaintiff. In Kenya abatement is automatic, and a plaintiff may not have had notice of the defendant's death. I agree with Farrell, J. that it cannot in these circumstances be said to be practicable for s. 371 to correspond with O. 23, r. 8 (2), so far as a plaintiff in person is concerned, and that it would accordingly appear that art. 178 applies in the case of a plaintiff in his capacity as such, and that such a plaintiff can apply within three years of the date of abatement

for the suit to be revived. I have intentionally limited the scope of this judgment to the position of a plaintiff in person, with which this appeal is concerned. It may be that different periods of limitation apply to an application by a plaintiff in person to revive a suit which has abated, under O. 23, r. 8 (2), and to a similar application made by the legal representative of a deceased plaintiff or by the trustee or official receiver of a bankrupt plaintiff. I express no opinion as to this, but if there is such a difference the position can be put right by legislation. I am further of the opinion that the words “if it is proved that he was prevented by any sufficient cause from continuing the suit” which occur in O. 23, r. 8 (2) relate to the period of six months limitation prescribed for applications to implead the legal representative of a deceased defendant, and not to the period of three years in which application can be made by a plaintiff in person to revive a suit. This is clear from the extract of the judgment of Sanderson, C.J. in *Sarat Chandra v. Maihar Stone and Lime Co.* ((1922), 49 Cal. 62), cited by Farrell, J. in the court below:

“The plaintiffs then had to show . . . that they were prevented by sufficient cause from continuing the suit. That means that the plaintiffs had to satisfy the court that there was sufficient cause for not applying in time to bring the legal representatives of the deceased defendant on the record.”

As Farrell, J. said:

“It would, in my view, be an absurdity to apply a fixed period of limitation to applications under r. 8 (2) whether that period is sixty days or three years, and at the same time impose on the applicant the burden of proving that he was prevented from making his application at an earlier time within the period. This would be contrary to the well-established rule of equity that laches has no application where limitation applies.”

For these reasons I agree that this appeal should be dismissed.

Appeal dismissed, with costs for two advocates.

For the appellant:

Satish Gautama

Satish Gautama, Nairobi

For the respondent:

EP Nowrojee and JH Sampat

JH Sampat, Nairobi

Ayoob v Ayoob
[1968] 1 EA 72 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 December 1967
Case Number:	34/1967 (16/68)
Before:	Sir Clement de Lestang, V-P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Rudd, J

[1] Divorce – Jurisdiction – Declaration – Whether court has jurisdiction to make – Form of proceedings for.

[2] Divorce – “Talak” – Whether divorce by “talak” effective to dissolve marriage contracted by Mohammedans under Marriage Act (K.) – Parties also married under Mohammedan law.

[3] Divorce – Mohammedans married by Mohammedan law and also under Marriage Act (K.) – Whether divorce by “talak” effective to dissolve marriage.

[4] Marriage – Marriage under Marriage Act (K.) – Followed by “marriage” by Mohammedan law – Whether can be dissolved by “talak” – Effect of subsequent “marriage”.

[5] Marriage – Various forms of and means of dissolving under Kenya law discussed.

[6] Mohammedan law – Divorce – “Talak” – Whether “talak” effective to dissolve marriage where parties married under Marriage Act as well as by Mohammedan law.

Editor’s Summary

The parties, both Mohammedans, were married under the Marriage Act of Kenya and later on the same day went through a ceremony of marriage according to Mohammedan law. The husband later purported to divorce the respondent by “talak”, and by petition to the High Court sought a declaration that his marriage was lawfully dissolved. This petition (reported at [1967] E.A. 416) was dismissed, and the husband appealed:

Held –

- (i) the High Court of Kenya has jurisdiction to hear and determine applications for declaratory orders insofar as Mohammedan marriages are concerned as well as in proceedings under the Matrimonial Causes Act (*Abdullah Tairara and Another v. Hussein bin Kassim* (1) followed);
- (ii) a claim for a declaration under the Mohammedan Marriage Act should be brought by suit, not (as under the Matrimonial Causes Act is not improper) by petition;
- (iii) the marriage in this case was not a “Mohammedan marriage” within the meaning of the Mohammedan Marriage Act, and could only be dissolved during the lifetime of the spouses by a decree of divorce under the Matrimonial Causes Act;
- (iv) (per Spry, J.A.) a ceremony purporting to be a marriage according to Islamic or customary law, following a Christian or civil marriage between the same parties, is not a marriage and cannot as such replace the actual marriage;
- (v) (per Spry, J.A., obiter) reliefs under customary law apart, the consequences of a marriage and the reliefs available to the parties depend in Kenya upon the form of the marriage ceremony and not on the faiths held by the parties; therefore a change of faith does not effect those consequences or reliefs.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Abdullah Tairara and Another v. Hussein bin Kassim* (1953), 20 E.A.C.A. 105.

- (2) *Rattansey v. Rattansey*, [1960] E.A. 81.
- (3) *Attorney General of Ceylon v. Reid*, [1965] 1 All E.R. 812.
- (4) *Khambatta v. Khambatta* (1935), I.L.R. 59 Bombay 278.
- (5) *Ohochuku, v. Ohochuku*, [1960] 1 All E.R. 253.
- (6) *Ali v. Ali*, [1966] 1 All E.R. 664.
- (7) *Parkasho v. Singh*, [1967] 1 All E.R. 737.
- (8) *Thynne v. Thynne*, [1955] P. 272.
- (9) *Fatuma binti Athuma v. Ali Baka* (1918), 7 E.A.L.R. 171.
- (10) *Cheni v. Cheni*, [1962] 3 All E.R. 873.
- (11) *Reder v. Reder*, [1948] W.N. 238.

December 19, 1967. The following considered judgments were read:

Judgment

Sir Clement De Lestang V-P: The appellant, a Sunni Muslim, and the respondent, a Shiite Muslim, were married in accordance with the Marriage Act (Cap. 150) on August 10, 1956. A marriage under this Act is monogamous. Subsequently they went through a ceremony of marriage according to Mohammedan Law, the respondent by then having adopted the doctrines of her husband's sect. On February 2, 1967, the appellant purported to divorce the respondent by pronouncing talak. A Mohammedan marriage can lawfully be terminated in such a way. The appellant then, by petition to the High Court, sought a declaration that his marriage to the respondent was lawfully dissolved. The learned judge held that a marriage under the Marriage Act was not a Mohammedan marriage and that it could only be dissolved during the joint lifetime of the spouses by a valid judgment of divorce pronounced under the Matrimonial Causes Act (Cap. 152). He accordingly dismissed the petition and the appellant appeals against such dismissal.

As the respondent was not represented on the appeal and the question raised was one concerning status and of great public importance, the President's Proctor was invited to assist the court and we are indebted to counsel who represented him for his able arguments.

Two principal questions arise for decision and I shall deal with them in turn. The first is whether the High Court has jurisdiction to make a declaration of the sort prayed for. Although both sides agree that there is jurisdiction the Court is not absolved from its duty to decide upon it but I think I can do so quite shortly.

Whether a marriage is one under the Marriage Act, which can only be dissolved by a judgment of the court in accordance with the Matrimonial Causes Act, or a Mohammedan marriage within the Mohammedan Marriage, Divorce and Succession Act (hereinafter referred to as the Mohammedan Marriage Act for short) which may be dissolved by talak, there is no express provision in any of those Acts empowering the High Court to grant declarations. In so far as marriages under the Marriage Act are concerned, s. 3 of the Matrimonial Causes Act (Cap. 152) provides that the jurisdiction of the High Court shall, subject to the provisions of the Act, be exercised in accordance with the law applied in matrimonial

proceedings in the High Court of Justice in England. In England, by virtue of r. 82 of the Matrimonial Causes Rules 1957, which, subject to those Rules, applies to matrimonial proceedings the rules of the Supreme Court, which in turn empower the court to make declarations (English O. 15, r. 17), declarations are occasionally, though not commonly, made in matrimonial proceedings. Since our Matrimonial Causes Act and Rules are silent on the point the English practice should therefore be followed. Consequently, in proceedings under the Matrimonial Causes Act declarations may

be made. In so far as Mohammedan marriages are concerned, it was held by this Court in *Abdullah Tairara and Another v. Hussein bin Kassim* ((1953), 20 E.A.C.A. 105), that the High Court has the power to hear and determine an application for a declaratory order and I can see no good reason not to follow that decision. A declaration was also granted by the High Court of Tanganyika (as it then was) in *Rattansey v. Rattansey* ([1960] E.A. 81). On the assumption that jurisdiction exists I have considered what form the proceedings should take. In England, in the absence of any prescribed procedure, it would seem that strictly the application should be by originating summons; but the practice has grown up and is now well-established of proceeding by way of petition; Rayden on Divorce (9th Edn.), p. 323. Thus in the case of marriages to which the Matrimonial Causes Act applies it would not be improper to proceed by way of Petition as was done here. In the case of marriages under the Mohammedan Marriage Act, as no procedure is prescribed at all the proceedings should be strictly by suit as was done in *Abdulla's* case (*supra*) on the analogy of the Civil Procedure Rules, since s. 89 of the Civil Procedure Act provides that the procedure provided in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.

But it seems to be the declared intention of the legislature that the procedure in matrimonial causes under the Mohammedan Marriage Act be assimilated to that under the Matrimonial Causes Act. It is no doubt for this reason that the Mohammedan Marriage, Divorce and Succession Rules, made under s. 7 of the Act, indirectly provide for petitions in regard to dissolution of marriages and restitution of conjugal rights. The rules are, however, silent on the question of declarations and although I think that it would be advisable for rules to be made permitting petitions in such cases also until this is done claims for declarations should be by suits. As, however, no objection was raised to the procedure in the present case the defect may either be ignored or the petition treated as a suit.

The second question is, was the marriage under consideration a Mohammedan marriage within the meaning of that expression in the Mohammedan Marriage Act?

Counsel for the appellant contends that it was for two reasons: (1) because Mohammedan law recognises as valid a marriage which is celebrated according to the law of the loci contractus and the present marriage was such a one, and (2) because whether the marriage was initially a Mohammedan marriage or not, it was converted into one by the parties having subsequently gone through a ceremony of marriage according to Mohammedan law.

I am unable to agree with either proposition. As regards the first, Mohammedan marriage is defined in s. 2 of the Mohammedan Marriage Act as "any marriage contracted in accordance with and recognised as valid by Mohammedan law". If I have understood the appellant correctly his contention is that, as Mohammedan law would recognise the parties' marriage under the Marriage Act as valid and as there is nothing to show that it is contrary to Mohammedan law, it is a Mohammedan marriage within the definition which I have quoted. This argument seems to me to be fallacious because there is a world of difference between contracting a marriage in accordance with Mohammedan law and recognising as valid under Mohammedan law a marriage otherwise contracted. For, example, the law of Kenya would no doubt recognise as valid the marriage of two Jews celebrated according to Jewish rites outside Kenya but this would not make the marriage a marriage in accordance with the Marriage Act. Moreover, the formalities required for, the legal effect, and the incidents of

a marriage under the Marriage Act and of a Mohammedan marriage under Mohammedan law differ widely. The Act requires special formalities which are not required by Mohammedan law and the capacity for marrying and the manner of dissolution of such marriages are different, to name only a few such differences. Much was made of the fact that in concluding that the present marriage was not a Mohammedan marriage the learned judge relied strongly on the monogamous character of a marriage under the Marriage Act which he contrasted with the potentially polygamous nature of Mohammedan marriages. It may well be, as contended, that certain Mohammedan marriages are monogamous and that consequently the learned judge's reasoning was not quite accurate. Nevertheless I think he came to the right conclusion. It is common ground that a marriage under the Marriage Act is monogamous. It seems to me also that such a marriage can only be dissolved during the lifetime of the spouses by a valid judgment of divorce under the Matrimonial Causes Act. In the first place the Registrar of Marriages, in a marriage under the Marriage Act, is required by s. 29 (2) (b) of the Marriage Act to so inform the parties at the time of the celebration of the marriage. The section requires him to address the parties in a set formula which contains the following:

“That this marriage cannot be dissolved during your lifetime except by a valid judgment of divorce, and if either of you before the death of the other shall contract another marriage while this remains undissolved, you will be thereby guilty of bigamy, and liable to punishment for that offence.”

It is true that in *Attorney-General of Ceylon v. Reid* ([1965] 1 All E.R. 812), Lord Upjohn, delivering the opinion of the Board, referred to a similar exhortation in s. 35 of the Marriage Registration Ordinance of Ceylon as being no more than a warning which could not be prayed in aid when considering whether the offence of bigamy had been committed under the Penal Code. While I respectfully agree with their Lordships' decision I fail to see its relevance in the present case since the question of bigamy or of an offence under a different law does not arise here. Moreover to decide that a marriage under the Marriage Act can be dissolved during the lifetime of the parties otherwise than by a judgment of divorce necessitates acceptance of the proposition that the legislature in requiring the Registrar of Marriages to inform the parties otherwise is requiring the doing of something which is wrong and is indeed misleading the public. I am not prepared to entertain such an argument. In the second place, provisions for dissolution of a monogamous marriage are to be found in the Matrimonial Causes Act and nowhere else. Under that Act such a marriage can only be dissolved during the lifetime of the spouses by a decree of the High Court and by no other method. This is incompatible with its being a Mohammedan marriage which may be dissolved by talak.

As regards Counsel for the appellant's second proposition, it would indeed appear from certain Indian cases, notably *Khambatta v. Khambatta* ((1935), I.L.R. 59 Bombay 278) and English cases, notably *Ohochuku v. Ohochuku* ([1960] 1 All E.R. 253), *Ali v. Ali* ([1966] 1 All E.R. 664) and *Parkasho v. Singh* ([1967] 1 All E.R. 737), that a polygamous marriage may be converted by change of domicile or of personal law of the parties, or by law and so forth, into a monogamous marriage and vice-versa; this was also decided in Tanganyika (as it then was) in *Rattansey v. Rattansey* [1960] E.A. 81. The position in those countries, however, is vastly different from the position in Kenya, which must be ascertained strictly according to the law of Kenya. In England, although for certain purposes the courts will recognise the efficacy of a Muslim marriage notwithstanding its potentially polygamous character they will not give any of the remedies or reliefs which English matrimonial law provides for monogamous

marriages. So the English courts have held in the cases cited above that a potentially polygamous marriage could become, in certain circumstances, monogamous, in which case English matrimonial law would apply. Although there is no reason why in principle the converse should not apply, the English courts have yet to hold that a marriage initially monogamous could in England be converted into a polygamous one, and thus deprive the parties of access to the courts.

In India the position is the converse of that in England because in that country the law does not apparently provide for the dissolution of marriages of domiciled Muslims by decree of the court.

As regards the position in Tanganyika, without in any way wishing to cast any doubt on the decision in *Rattansey v. Rattansey* (*supra*) I would like to make it clear that I refrain from expressing any concluded view thereon as it is unnecessary to do so. It is sufficient to point out that at the time of that decision the law of Tanganyika was not identical with that of Kenya. For example, two Muslims could not marry under the Tanganyika Marriage Act (vide s. 3). In Kenya, however, anybody, whatever his creed, can marry under the Marriage Act but there are also special Acts regulating marriages between Muslims, Hindus and Pagans. Christians, however, can only marry under the Marriage Act. The result, in the case of Muslims, this being the case with which we are concerned, is that they are given a choice either to marry under the Mohammedan Marriage Act, in which case all the incidents of a Mohammedan marriage will apply, or under the Marriage Act, in which case the marriage will be monogamous and indissoluble except under the Matrimonial Causes Act. I agree with counsel that the whole scheme of the Kenya legislation on this subject is designed to give an option to those normally subject to customary law or Muslim law to contract a monogamous union by giving up their rights under their own personal law.

In arriving at this conclusion I have not relied on ss. 37 and 50 of the Marriage Act and s. 5 of the Mohammedan Marriage Act, which read literally would make it an offence, punishable like bigamy, for an African or Muslim married under the Marriage Act to marry the same person in accordance with customary law or Mohammedan law, as the case may be. Although a literal interpretation can logically be defended, principally on the difference of language used in ss. 11 (1) (d) and 49 of the Marriage Act, and s. 6 of the Mohammedan Marriage Act, it would in my view be quite unreasonable to do so. I am nevertheless satisfied that the conclusion at which I have arrived is borne out by the scheme of the Acts and their interplay.

Besides, the parties being duly married under the Marriage Act, the second ceremony had no legal effect (vide *Thynne v. Thynne* ([1955] P. 272) and *Ali v. Ali* ([1966] 1 All E.R. at p. 669)) and could not convert what was not a Mohammedan marriage into one.

For these reasons I would dismiss this appeal and as Spry and Law, JJ.A. also agree, it is so ordered. There will be no order as to costs.

Spry JA: The parties to these proceedings were married before a registrar under the provisions of the Marriage Act (Cap. 150). Later, on the same day, they went through a ceremony according to Islamic law. Subsequently, the husband purported to divorce the wife by talak, and he sought a declaration from the High Court that he was validly and effectively divorced. The application to the High Court and the appeal to this court were argued on the basis that the divorce was effective under Islamic law.

The first question that has to be decided is whether the statute law of Kenya precludes the dissolution of a marriage contracted under the Marriage Act

otherwise than by death or the judgment of a court. There is no express provision to that effect. The only relevant provision is s. 29, which relates to marriages before a registrar and which, in sub-s. (2), requires the registrar to address the parties, saying:

“Know ye . . . that this marriage cannot be dissolved during your lifetime, except by a valid judgment of divorce . . .”

In the absence of authority, it might be argued that these words require a provision to be implied in the Act to the effect that a marriage under the Act can only be dissolved by a judgment of divorce. A provision in a Ceylon statute similar to s. 29 (2) was, however, considered by the Judicial Committee in *A.-G. of Ceylon v. Reid* ([1965] 1 All E.R. 812), when the judgment of the Board included a statement that “the exhortation contained in the registrar’s address is no more than a warning”. Moreover, the courts are always reluctant to imply in any statute a provision conferring or taking away rights. Certainly nothing would have been easier than to include an express provision, as was in fact done in the Ceylon statute. It is perhaps relevant that when the Hindu (Marriage, Divorce and Succession) Ordinance 1946 (since repealed) was enacted, the legislature thought fit expressly to say, in s. 12, that nothing in that Ordinance should “permit the dissolution of a marriage contract” under the Marriage Act. I feel forced to conclude that the Marriage Act does not govern the way in which marriages contracted under it may be dissolved.

The Marriage Act relates only to monogamous marriages and the Matrimonial Causes Act provides for the dissolution of such marriages by divorce. Counsel for the appellant argued, however, that those provisions are not necessarily exclusive. He relied on two main submissions. The first was that the definition of “Mohammedan marriage” in s. 2 of the Mohammedan Marriage, Divorce and Succession Act (Cap. 156) is so wide that it may, in certain circumstances, include a civil marriage contracted under the Marriage Act. He argued that there is nothing in the definition to suggest that a “Mohammedan marriage” is necessarily polygamous, nor, for that matter, is a marriage necessarily polygamous under Islamic law. Under Islamic law, marriage is a civil contract, not a sacrament, and Islamic law would recognize as valid a marriage contracted in accordance with the civil law, the essential requirement, the consent of the parties, being satisfied. Therefore, in appropriate circumstances, relief under Cap. 156 might be available to a person married under the Marriage Act.

With respect, I am not persuaded by that argument. In the first place, the definition of “Mohammedan marriage” imposes two conditions: the marriage must not only be recognized as valid by Islamic law but must also be “in accordance with” that law. One must endeavour to give a meaning to those words. Secondly, s. 3 (1) of Cap. 156 says that “Mohammedan marriages, whether contracted before or after the commencement of this Act, shall be deemed to be valid marriages throughout Kenya”. That provision cannot possibly be interpreted as validating marriages already valid under another statute and it is, I think, explained by reference to the decision in *Fatuma binti Athuma v. Ali Baka* ((1918), 7 E.A.L.R. 171), which presumably led to the passing of the Act. It seems to me quite clear that the expression “Mohammedan marriages” as used in Cap. 156 was intended to relate to a particular category of marriages which might perhaps be defined as those marriages which are valid by Islamic law but not otherwise.

Counsel for the appellant’s second argument, which has occasioned me much more difficulty, was that even if the marriage between the parties contracted under the Marriage Act was not a “Mohammedan marriage”, it was converted into one by the subsequent ceremony. I would say straight away that in my view that

second ceremony was not a marriage. Counsel for the appellant cited the English case of *Ohochuku v. Ohochuku* ([1960] 1 All E.R. 253), a case in which the parties, having contracted marriage by a ceremony in Nigeria, which under Nigerian law was potentially polygamous, went through a second ceremony in London. On a petition for dissolution of marriage, Wrangham, J., posed the question, which marriage was to be dissolved? He decided that as the Nigerian marriage was potentially polygamous, the English courts had no jurisdiction to dissolve it: the English courts had, however, jurisdiction in respect of the English marriage and, being satisfied that there was good reason to do so, he dissolved that marriage. Counsel for the appellant relied on this case as showing that the character of a marriage could be changed from potentially polygamous to monogamous by a subsequent ceremony, and he found support for this submission in *Cheni v. Cheni* ([1962] 3 All E.R.) in which, at p. 878, Sir Jocelyn Simon, P., spoke of Wrangham, J., in *Ohochuku's* case (*supra*) as having “treated the latter [ceremony] as having converted the original and potentially polygamous marriage into a monogamous union”. *Ohochuku's* case was again considered in *Ali v. Ali* ([1966] 1 All E.R. 664) when Cumming-Bruce, J., said of it (*ibid.* at p. 669):

“As by English law the parties were validly married, I find it a little difficult to see how the registrar succeeded in marrying them again. The significance of the case, however, is that it was recognized by Wrangham, J., as a valid case of conversion of a potentially polygamous marriage into a monogamous marriage.”

With the greatest respect, I am by no means sure that that was the ratio decidendi in *Ohochuku's* case. Nowhere in his judgment does Wrangham, J., say, or even suggest, that the character of the first marriage was “converted” by the second ceremony. On the face of it, his reasoning appears to have been that since the English courts have no jurisdiction to dissolve a polygamous marriage, he could shut his eyes to the first marriage and apply his mind to the second ceremony as if that ceremony had created the marital status between the parties. What he does not seem to have considered was whether the second ceremony was of any legal effect, as to which the remarks of Cumming-Bruce, J., in *Ali's* case (*supra*) are relevant.

Where there have been two ceremonies, the court must decide which operated to create the marriage union (*Reder v. Reder* ([1948] W.N. 238)) but it is not a particular ceremony which is dissolved by a decree of divorce, but the marriage status (*Thynne v. Thynne* ([1955] p. 272)). In *Thynne's* case, the parties had gone through two ceremonies and a decree of divorce was granted in respect of the later. An application for amendment of the decree made to the High Court was dismissed but an appeal to the Court of Appeal was successful. The court was divided on the propriety of amendment but unanimous that the second ceremony was of no effect. Hodson, L.J., in a dissenting judgment, said (*ibid.* at p. 304):

“The decree . . . refers specifically to the ceremony of marriage between the parties, which in this case, according to the evidence of earlier marriage now before the court, was a mere ceremony having no legal effect. The decree on the face of it is good, but, if the only effect of the decree were to operate upon this idle ceremony and not upon the marriage status, it would be a nullity.”

In Kenya, however, the position is peculiar because there is express statutory provision, in s. 9 of the African Christian Marriage and Divorce Act (Cap. 151), for the conversion of a marriage under customary law into a statutory marriage

and the conversion is expressly referred to as the contracting of a marriage, even though the marital status already exists. It would seem to be implicit in s. 11 (1) (d) of the Marriage Act that an Islamic marriage may similarly be converted and in s. 6 of Cap. 156 that a customary marriage may be converted into an Islamic one. There is, however, no provision enabling a Christian or civil marriage to be converted into an Islamic or customary one, or for an Islamic marriage to be converted into a customary one.

It seems to me, therefore, both on general principles and on the doctrine of *expressio unius, exclusio alterius*, that a ceremony purporting to be a marriage according to Islamic or customary law, following by a Christian or civil marriage between the same parties, is not a marriage and cannot as such replace the actual marriage.

That does not, however, entirely dispose of the matter: there is still the question to what extent a person in Kenya may change his personal law and what is the effect of so doing. In the case of *A.-G. of Ceylon v. Reid* ([1965] 1 All E.R. 812), the Board, after remarking that Ceylon is a country of many races and many creeds (as is Kenya) went on to say (*ibid.* at p. 817):

“Whatever may be the situation in a purely Christian country (as to which their lordships express no opinion), they cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there . . . In their lordships’ view, in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law . . . If such inherent right is to be abrogated, it must be done by statute.”

Basically, I think that would be true also of Kenya, but the position has been complicated by legislation, much of which is difficult to understand. Before there was any local statute law, people were being married by Christian, Islamic and traditional ceremonies. The first legislation came in 1902, with the Marriage Act, which provided for Christian (although the word was not used) and civil marriages and validated the Christian marriages that had already taken place. Islamic marriages were always recognized as valid in the coastal strip, as part of the domains of the Sultan of Zanzibar, but it was not until 1920 that their validity throughout Kenya was formally recognized by Cap. 156. In 1946, provision was similarly made recognizing Hindu marriages, again with retrospective effect, but this was replaced in 1960 by the Hindu Marriage and Divorce Act (Cap. 157). An examination of these various enactments shows their effect to have been restrictive of the personal laws they recognized. For example, Cap. 156 does not provide that the matrimonial reliefs afforded by Islamic law are to be available to Muslims; it merely makes them available to persons married under a “Mohammedan marriage”, as defined. Thus while a person may in some respects change his personal law by changing his religion, he cannot necessarily do so as regards existing obligations.

It seems to me that what the legislature of Kenya has done is, in effect, to provide that the consequences of a marriage and the reliefs available to the parties depend on the form of the marriage ceremony and not on the faiths held by the parties, and therefore that a change of faith does not affect those consequences or reliefs. (I express no opinion regarding reliefs under customary law, with which this appeal is not concerned.)

I do not think the case of *Rattansey v. Rattansey* ([1960] E.A. 81), which was cited to us, is of any assistance since the law of Tanganyika was materially different from the law of Kenya.

So far as the present proceedings are concerned, I think, with respect, that the learned trial judge was right, and I too would dismiss this appeal.

Law JA: I agree with the judgments which have been delivered, and to which I cannot usefully add anything.

Appeal dismissed.

For the appellant:

IT Inamdar and Subodh Inamdar

Subodh Inamdar, Nairobi

Eugene Cotran (of the English Bar), instructed by the President's Proctor, as amicus curiae.

Dent v Kiambu Liquor Licensing Court [1968] 1 EA 80 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	19 January 1968
Case Number:	268/1967 (19/68)
Before:	Harris J
Sourced by:	LawAfrica

[1] *Licensing – Appeal – Record of proceedings – Failure to produce at request of appellant – Effect – Liquor Licensing Act, s. 18 (1).*

[2] *Licensing – Appeal – Refusal to renew licence – Proprietor of club refusing to serve non-members with drinks – Whether proper ground for refusal – Liquor Licensing Act, s. 16 (a) to (f) (K.).*

[3] *Licensing – Costs – Costs allowed on appeal against licensing court.*

[4] *Licensing – Procedure at hearing – Whether persons not members of licensing court should sit with court – Whether formal evidence of allegations necessary.*

Editor's Summary

The appellant in 1966 purchased a club, the premises of which had enjoyed a proprietary club liquor licence since 1952. She had a licence for the year 1967, which she applied to renew for 1968. Her application was rejected by the respondent court on a number of grounds, one of which was that the appellant had refused to supply alcoholic drinks to persons who were not members of the club. An uncontroverted affidavit filed by the appellant showed that at the hearing in the respondent court the president sat at a table with some thirteen other persons, nine of whom were apparently not members of

the court. It also appeared that none of the facts upon which the respondent court based its decision was formally proved in evidence. No copy of the order of the respondent court was furnished to the appellant in spite of a request by her advocates; and no copy of the minutes of the relevant meeting was produced until called for by the High Court at the hearing of this appeal. On appeal by the appellant:

Held –

- (i) the circumstances under which the licensing court or the High Court is entitled to refuse to renew an existing licence are expressly confined to those set out in paras. (a) to (f) of s. 16 of the Liquor Licensing Act;
- (ii) neither of the grounds relied upon by the respondent court fell within those circumstances; and the refusal to renew could not be supported on the merits;
- (iii) apart from the merits, the order of the licensing court would have had to be set aside on the ground of irregularities of procedure;
- (iv) in the circumstances, costs should follow the event.

Observations on the correct procedure to be followed by licensing courts when hearing applications and when requested to furnish copies of proceedings thereafter.

Appeal allowed with costs.

Case referred to:

(1) *Elijah Ndegwa v. Nairobi Liquor Licensing Court*, [1957] E.A. 709.

Judgment

Harris J: At the conclusion of the argument of counsel for the respondent in this case I was satisfied that the appeal must succeed, the decision of the court below be set aside, and the renewal for the year 1968 sought by the appellant of her proprietary club liquor licence under the Liquor Licensing Act (Cap. 121) in respect of the premises of the Kentmere Club, Limuru, be granted. I therefore, in view of the fact that the licence was about to expire in the course of the next three days, made an order at the hearing in the terms indicated, the reasons to be given later, and reserving the question of costs. I will now proceed to give the reasons for my decision and to deal with the costs.

It was not in dispute that the premises, under one name or another, have enjoyed a proprietary club liquor licence since the year 1952, that the appellant purchased the club in 1966, and at all material times was the holder of a current licence in respect of the club for the year 1967. Her application for renewal came before the Kiambu Liquor Licensing Court, within whose jurisdiction the premises lie, on November 27, 1967, and the following are the literal terms of the official minutes of the proceedings at the hearing:

“The Kentmere Club (Mrs. P. Dent) Plot No. 154/32, Limuru, P.O. Box 9666, Nairobi.

The renewal of Kentmere Private Members Club was rejected for the current year 1968, on the following grounds:

- (a) it has been difficult for the men in charge of the security in the district to check on who goes to this particular private club, because at many occasions CD cars are seen there;
- (b) the club is situated in the rural area and local people have complained bitterly that the club does not cater for them due to the fact that they are not members because the membership fees for the club is Shs. 50/- p.a. and local people cannot afford to pay.

Also there is evidence given in the presence of Mrs. Dent and her advocate by one member in the Liquor Licensing Court that he and five others who he had taken there between 6.30 and 7.00 p.m. for drinks were refused drinks, but instead they were offered tea. He was told by the important caterer that in order to get drinks he must pay Shs. 50/- temporary membership fees. It was not even revealed to the particular person that the temporary membership fees; by the caterer refusing to disclose the actual 10/- temporary membership fees was a sign of discrimination.

The court therefore, recommends that the licence for the current year not to be renewed under the private members club, but the court recommended that the owner should apply for either hotel or restaurant liquor licence which will permit the members of the public to have an access.

The applicant has if he wishes, got twenty-one days in which to appeal to/has the High Court of Kenya under s. 18 (1) of Cap. 121, Laws of Kenya, from the date of the Liquor Licensing Court’s meeting.”

It was conceded at the hearing of the appeal that, as to ground (a) upon which the licensing court based its decision, no evidence had been given before that court as to any difficulty having been encountered by the police or other security forces in regard to ascertaining what persons frequent the club, but counsel for the respondent suggested that, since the club is a private club, the police are not entitled to visit and inspect the premises. This suggestion would appear to have been made without regard to the provisions of s. 38 of the Act which expressly enabled any police officer not below the rank of inspector to enter and inspect without written authority any licensed premises for the purpose of ascertaining, among other things, whether the licensee is committing any breach of the Act or of his licence.

The circumstances under which either the licensing court or this court is entitled to refuse to renew an existing licence granted under the Act are expressly confined to those set out in paras. (a) to (f) of s. 16 of the Act, and of these the only circumstance upon which it was sought to rely in the present case is that contained in para. (d), namely, that the business of the club was conducted in an improper manner. It was clear therefore that, in the absence of any relevant evidence, the first ground set out in the minutes of the court's proceedings did not fall within para. (d) of the section and that the decision appealed from, so far as it was based on that ground, could not be supported.

The second ground put forward by the licensing court in support of its decision was, in short, the refusal of the appellant to supply on request alcoholic drinks to non-members of the club who were desirous of purchasing them, as a result of which some local residents had complained that, since they could not afford to pay either the yearly membership fee of Shs. 50/- or the temporary daily membership fee of Shs. 10/-, they were being made the victims of discrimination. Here again counsel for the respondent sought to rely upon para. (d) of s. 16. The keynote of this legislation in regard to clubs is founded upon the principle that a sharp line of discrimination must be drawn by the licensee as between members and non-members of the club in question, and cl. 10 (2) of the schedule to the Act expressly lays down that no premises shall be deemed to be a club wherein persons other than members are charged or permitted to pay for liquor. It is manifest, therefore, that in declining, as she did, to supply non-members with alcoholic refreshment the appellant was acting in strict and proper compliance with the provisions of the Act and that if she had yielded to the request made by such non-members she would have been committing a breach of the legislation and possibly giving cause for a refusal by the licensing court to renew her licence at the next licensing sessions. These statutory provisions represent in part the endeavours of the legislature of this country to reduce the measure of over-indulgence in alcohol which contributes so largely to the incidence of crime, particularly in relation to the control and management of vehicular traffic on the public roads. Members of licensing courts are quite entitled, in their capacity of private persons, to hold views contrary to those of the legislature upon this matter and to feel that licensees of clubs should be at liberty to supply liquor on sale to all callers without regard to club membership, but when sitting as members of such a court they are bound conscientiously to uphold and apply the provisions of the relevant legislation in every respect. For the reasons which I have stated it was clear that the second ground set out in the minutes of the court below did not fall within para. (d) of s. 16 and that its decision, based on that ground, could not be supported.

Although it is apparent from what I have said that this appeal was bound to succeed on the merits it may be of some assistance to licensing courts generally that I should draw the attention of the respondents to certain points of procedure relating to the important and sometimes difficult duties which confront such

courts in the exercise of the jurisdiction entrusted to them under the Act, a task rendered more difficult to them by the fact that, in the majority of cases, none of them is a professionally trained lawyer.

It appears from an affidavit filed by the appellant in the present case, which has not been controverted, that at the hearing in the court below the president of the court sat at a table with some thirteen other persons, most of whom joined in the discussion relative to the appellant's application, and that at the conclusion of the discussion the president called for a vote against the application and four persons raised their hands in support whereupon he announced that the court had unanimously decided not to grant the application. From this it would seem that some nine of the persons seated around the table were not members of the court. This arrangement, it needs hardly be stated, was entirely irregular. Licensing courts are not mere executive bodies but are courts from which an appeal lies directly to this court and they must be conducted in a manner appropriate to judicial tribunals. This requires that the members shall sit apart from all other persons present, and that, except for the taking of evidence from the witnesses, noting the submissions of the parties and, if necessary, conferring with their registrar or clerk, they shall not discuss the matter with any other person until their decision shall have been pronounced.

It appears also that none of the facts upon which the court based its decision was formally proved in evidence. As has already been said, a licensing court may refuse to renew an existing licence only when it is satisfied as to one or more of the six matters set out in s. 16 of the Act. In this sense the word "satisfied" means judicially satisfied and, apart from matters of which the court may take judicial notice within the meaning of s. 60 of the Evidence Act (Cap. 80) and facts admitted by the parties, this must normally require the production of proof of the matter referred to by evidence on oath or affirmation upon which the opposing party may put questions in cross-examination. In addition, s. 11 (7) of the Liquor Licensing Act requires the court to maintain records of its proceedings including notes of the evidence and arguments. In the present case these requirements all seem to have been overlooked.

In both the court's own minutes and the appellant's affidavit it is stated that during the hearing a number of the court gave evidence to the effect that he and others had been improperly refused drinks by the club. This statement was denied by counsel for the respondents, speaking from the Bar, who said that there had been a misunderstanding, and accordingly I need not refer further to it save to say that as was held in *Elijah Ndegwa v. Nairobi Liquor Licensing Court* ([1957] E.A. 709), it would have been entirely improper for a member of the tribunal to have given evidence in a case in which he was participating as such member.

Counsel for the respondents, in seeking to justify the action of the court in declining to renew the licence, said that that court had been "under pressure from local inhabitants" who apparently objected to the fact that, not being members, they found themselves unable to obtain drinks at the club. It is no doubt precisely to resist such pressures that the functions of granting and renewing licences have been entrusted by the legislature to the hands of the licensing courts, and if any person appointed to such a court were to find himself so placed that he is being excessively embarrassed by pressure of this nature he should perhaps consider his position and the desirability of his retaining his appointment.

Lastly reference must be made to the failure of the respondents to furnish the appellant with a copy of their decision leading to the present appeal. By s. 18 (1) of the Act a licensee whose application for a renewal of his licence has been refused may within twenty-one days of such refusal appeal to this court.

By O. 41, r. 1 (1) of the Civil Procedure (Revised) Rules 1948, every appeal to this court shall be preferred in the form of a memorandum accompanied by a certified copy of the decree or order appealed from. In the context of the present case, therefore, the appellant was required to file her memorandum of appeal within twenty-one days after November 27, 1967, being the date of the refusal to renew her licence, and with this in view her advocates, by letter dated November 28, requested the district commissioner at Kiambu to furnish them as a matter of urgency with a certified copy of the order of refusal and also a copy of the minutes of the meeting at which the renewal of the licence was refused. This request was acknowledged by letter dated November 6 but was never complied with, no copy of the licensing court's order was ever furnished (and possibly none exists), and no copy of the minutes of the meeting was produced until called for by this court on the hearing of the appeal notwithstanding that these minutes, which are set out above, run to less than thirty lines of typescript. Fortunately the case for the appellant was so clear that no injustice resulted but nevertheless it is important that the persons constituting the administrative side of licensing courts should be aware of the statutory requirements regarding appeals to which I have referred and should take care to ensure that full compliance is effected therewith, bearing in mind that in some cases it may not be possible for an intending appellant to prepare his memorandum of appeal until he has had an opportunity to study and consider (possibly with his legal adviser) the terms of the refusal to renew and the relevant minutes.

From what I have said it will be seen that, even if the appeal had not succeeded on the merits, the order of the licensing court would have had to be set aside on the ground of irregularities of procedure. I have set out these irregularities in some detail in view of the fact that this is not the first occasion recently when such errors have come to light in a licensing appeal and it is apparent that the due administration of the Act is giving rise occasionally to some difficulties.

As to the costs, I see no reason why they should not follow the event and I so direct, in addition to which, having regard to the importance of the case to the appellant, and the difficulty placed in her way by her inability to obtain copies either of the order appealed from or of the minutes, I shall certify for Queen's Counsel and junior counsel.

Order accordingly.

For the appellant:

*JA Mackie-Robertson, QC and JA Couldrey
Kaplan & Stratton, Nairobi*

For the respondent:

*AA Mulla (State Counsel, Kenya)
Attorney-General, Kenya*

Amradha Construction Company v Sultani
Street Agip Service Station
[1968] 1 EA 85 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam

Date of judgment: 29 September 1967

Case Number: 14/1967 (27/68)

Before: Saidi J

Sourced by: LawAfrica

[1] Costs – Notice of intention to sue – Notice not given – Plaintiff alleges defendant about to leave country – Consent order made – Amount of claim paid before first hearing – Whether special case made out under Rules of Court (Advocates’ Remuneration and Taxation of Costs Rules), r. 61 (T.).

Editor’s Summary

The appellant, who had been a regular customer of the respondent for some considerable time, owed the respondent on August 30, 1966 a total of Shs. 6,817/35. Between September 3 and September 30, 1966 the appellant bought petrol, oil and other goods from the respondent valued at Shs. 2,835/50, bringing the appellant’s indebtedness to Shs. 9,652/85. Between September 23 and September 30 the appellant paid a total of Shs. 4,000/- towards his account. This left a balance of Shs. 5,652/85. The respondent on October 15, 1966 sued the appellant for that amount, without first giving the appellant any notice of his intention to sue. The respondent also applied for security for the amount due and costs, on the ground that the appellant had disposed or was about to dispose of all his property and was intending to leave Tanzania. The court made an order for conditional attachment of the appellant’s goods. The appellant objected to this attachment and ultimately, after further proceedings, a consent order was recorded by which the appellant was to deposit the amount claimed in court. He duly did so with an admission of liability, and the whole amount was, by consent, paid out on the same day to the respondent. An argument then arose about costs. The appellant objected to any order to pay costs because no notice of an intention to sue had been given. The district court allowed the respondent his costs (on the undefended scale) on the grounds that in the circumstances there was justification for the filing of the suit without giving notice of intention to sue. Against this the appellant appealed.

Held –

- (i) it is clear from r. 61 of the Rules of Court (Advocates’ Remuneration and Taxation of Costs Rules) that where a suit is brought without notice to the defendant and the defendant pays the amount claimed before, or even on the date of, the first hearing, no advocates’ costs will be allowed except on a special order of the court;
- (ii) the payment into court was made for the purpose of discharging the liability of the appellant to the respondent;
- (iii) on the facts, the respondent had not made out a special case which would entitle him to costs.

Appeal allowed, with costs.

No cases referred to in judgment

Judgment

Saidi J: This is an appeal against an order for costs. Counsel for the respondent raised a preliminary objection against the appeal. He contended that it was incompetent because it arose from a consent decree. It is true that the appellant, who was the defendant in this action, had admitted the claim of the respondent in his written statement of defence. In

fact the sum claimed was deposited in court before the written statement was filed, following a consent order made by the trial court on November 18, 1966 for this amount to be deposited and the motor vehicle of the appellant, which had been attached before judgment, to be released. It does not however appear that the order for costs was also made with the consent of the parties. The record of the trial court shows that it was disputed by learned counsel for the appellant. I am therefore satisfied that the contention of counsel for the respondent that this appeal is incompetent cannot succeed, and I overrule his preliminary objection.

From the record of this case it would appear that the appellant had been a regular customer of the respondent for some considerable time. The annexure to the plaint dated September 30, 1966 shows that on August 30, 1966 the appellant owed the respondent the sum of Shs. 6,817/35. Between September 3 and September 30, 1966 the appellant bought petrol, oil and other goods valued at Shs. 2,835/50 from the respondent. This brought his indebtedness to the respondent to the sum of Shs. 9,652/85. Between September 23 and September 30 he paid to the respondent a total sum of Shs. 4,000/- towards his account.

On October 15, 1966 the respondent's advocate instituted Civil Case No. 2727 of 1966 in the District Court of Dar-es-Salaam claiming from the appellant the sum of Shs. 5,652/85, the sum then due from him, without having given the appellant notice of his intention to sue. On the same day the respondent's advocate filed an affidavit affirmed by the respondent on October 13, 1966 alleging that the appellant had disposed or was about to dispose of all his property in Dar-es-Salaam and was then intending to leave Tanzania. The respondent prayed in his affidavit that the appellant be asked to furnish security for his balance and the costs of the suit, and that the court should order conditional attachment of the appellant's shop goods. On the same day the respondent's advocate appeared before the learned senior resident magistrate and said the following:

"The judgment debtor has already left the country and is on his way to Mombasa to catch a boat for India. It is feared that he might dispose of his assets."

On the ground of these allegations the court made the following order:

"Application for conditional attachment of the goods and vehicles granted upon the grounds of the affidavit before this court."

It would appear that the shop goods of the appellant having been attached, he immediately made efforts to move the court to raise the attachment. There is an appearance made before the court on October 25, 1966, when a consent order was made in the following terms:

"By consent chamber affidavit 2/11/1966.
by
Reply 7/11/1966.
Hearing 12/11/1966.

It is not clear from the proceedings of this date whether the parties appeared by themselves or by their advocates.

The next appearance was on November 12, 1966, when the court set down November 16, 1966 as the date for hearing. On November 16, 1966 the hearing was adjourned to November 17, 1966, by consent of

the parties. On November 18, 1966 there was another consent order whereby the appellant agreed to deposit the principal amount in court within three days and the respondent agreed that on the deposit of this amount the motor vehicle of the appellant should be released. The order of this date was in the following terms:

“By consent defendant to deposit the principal amount in court in three days. The vehicle to be released if the said sum is deposited in the court.

W.S.D. by 7/12/1966.

Reply 21/12/1966.

” 22/12/1966.

Costs to follow the events.”

Then there were two more orders made on November 28, 1966 and December 22, 1966. The hearing was set down for March 8, 1967.

The proceedings on March 8, 1967 are brief and are as follows:

“*Barot*: The monies were deposited in court. Question as to costs.

No notice of demand given.

Kesaria: I admit the notice is not given. Section 35 of C.P. Code – Section 30 – Costs shall follow the event. Rules of Court I page 194 – Section 61 – No costs except on the special order of the court. It only refers to advocates’ costs. In this case plaintiff filed.

Property of the debtor attached before judgment. The debtor in the court and files objection proceedings. There is no allegation in the affidavit about deposit of money. The plaintiff is obliged to file the suit as the defendant has no attachable property in the country. The court asked that the money to be deposited after three days. The appellant signed affidavit on 18/10/66 and on 18/11/66 money deposited. The money was not deposited at the first hearing. Although the defendant bought a vehicle but it was not in his name. There was no attachable property. This was a case when the plaintiff is obliged to act promptly. The defendant has gone away without informing the plaintiff the reason of his trip.

Barot: The notice of intention was not given. Money deposited has been paid and accepted by the plaintiff prior to the hearing of the case. Rule 26 quite clear. The argument about previous hearing not relevant. The chamber application for specific purpose of setting aside of attachment. The hearing before the court based upon application to raise attachment. The hearing today is the first hearing and in his defence the defendant admits liability and deposits the money in the court.

(Sgd.) G. M. Sheikh.

S.R.M.

Ruling:

Both counsel have argued the issue of costs. Counsel for the defendant submits that since no notice to sue was given and the defendant has deposited the monies in the court with admission of the liability, the costs against him should not be allowed. Counsel for the plaintiff explained the circumstances which lead to filing of the plaint without letter of demand which was the departure of defendant to Kenya with a motor vehicle without notice to the plaintiff, the motor vehicle being the only attachable means.

I have given necessary careful consideration to the submissions of counsel and I feel that there is ample justification for institution of the suit without notice to sue. This suit was in no way different from suits requiring urgent and immediate action on the part of the plaintiff. Moreover the deposit of the money was not by way of defence but under order of the court as a condition to the raising of the attachment.

I hold that the advocate for the plaintiff is entitled to costs but on the undefended scale.

(Sgd.) G. M. Sheikh.

S.R.M.”

It would appear from the ruling of the learned senior resident magistrate that the conditions of rule 61 of the Rules of Court (Advocates' Remuneration and Taxation of Costs Rules), Vol. 5, p. 194, were not taken into account by him when he was deciding the question of costs. This rule reads as follows:

“No advocate’s costs where suit brought without notice G.N. No. 193 of 1924.	61. If the plaintiff in any action has not given the defendant notice of his intention to sue, and the defendant pays the amount claimed or found due at or before the first hearing no advocate’s costs will be allowed except on a special order of the Judge.”
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It is clear that where the suit is brought without notice to the defendant and the defendant pays the amount claimed before the first hearing, or even on the date of the first hearing, no advocate’s costs will be allowed except on a special order of the court. There is no dispute at all that the whole sum claimed was paid before the first hearing. On November 18, 1966 there was a consent order to the effect that the whole amount, that is, Shs. 5,652/85, should be deposited in court within three days, and that immediately on the deposit of this sum in court the motor vehicle of the appellant which had then been attached should be released. On the same day it was ordered that written statement of defence was to be filed by December 7, 1966, the reply by December 21, 1966. After two further mentions, on November 28 and December 22, 1966, the hearing was set down for March 8. The money claimed was in fact deposited in accordance with the order of November 18, 1966 and a copy of the voucher dated January 25, 1967 shows that the whole amount was by consent of the parties paid out to the respondent’s counsel on the same date. In fact the respondent was paid all his money in January, almost two months before the hearing took place.

I do not agree with the views of the learned senior resident magistrate that the deposit of the money claimed in court was not by way of defence but under an order of the court as a condition to the raising of the attachment. At any rate that deposit was not for any other purpose except for the payment of the claim. It was not made for the benefit of the court but for the purpose of discharging the liability of the appellant to the respondent. If that had not been so, and the payment was only for the purpose of raising the attachment, then the appellant would not have consented to the payment of this sum to the respondent.

Even in a case like this, that is to say where a suit is brought without notice to the defendant, advocate’s costs could still be allowed, but this must be on a special order of the court. Now the ruling of the learned senior resident magistrate dated March 8, 1967 concerning the costs in this action does not seem to me to be a special order. The court must give special reasons for awarding the counsel’s costs of a plaintiff who brings a suit without notice to the defendant. In my view there would be very few cases where such a course should be taken. The only ground on which the learned senior resident magistrate based his ruling was that the suit required urgent and immediate action on the part of the plaintiff. This is to be found in the affidavit of the respondent dated October 13, 1966 alleging that the appellant had disposed or was about to dispose of all his property in Dar-es-Salaam and was then intending to leave Tanzania, and also in the statement of his counsel before the court that the judgment debtor had already left the country and was on his way to Mombasa to catch a boat for India, and that it was feared that he might dispose of his assets. It would appear that the appellant had exaggerated the situation and had to some extent misled his counsel, because none of these allegations appears to be borne out by subsequent

events. The shop goods and motor vehicle of

the appellant were attached soon after the order of the court on October 15, 1966. Three days later the appellant swore an affidavit before a commissioner for oaths in Dar-es-Salaam, and on October 25 he appeared in court, and there were further appearances by him on November 12, 16, 18 and 28, 1966. On November 18, 1966 the appellant agreed to deposit the money claimed in court, and on November 28 he agreed that the money claimed could be paid to the respondent. It would therefore appear that the information which the respondent had passed on to his counsel that the judgment debtor had already left the country and was on his way to Mombasa to catch a boat for India was not entirely correct. His allegation that the appellant had sold his motor vehicle already in Dar-es-Salaam does not appear to be correct also, because it is the same motor vehicle which was later attached.

I think on these facts it is clear that the respondent had not made out a special case which would entitle him to the award of counsel's costs of the action. He had been trading for a considerable time with the appellant, who had already paid him large sums of money. Between September 23 and 30, just about three weeks before he commenced this action, he had received from the appellant the sum of Shs. 4,000/- towards his running account. There was therefore no need on his part to rush the matter when he could have contacted the appellant, who was well known to him and was in Dar-es-Salaam.

Accordingly the appeal is allowed, with costs.

Appeal allowed.

For the appellant:

AA Lakha

Fraser Murray, Roden & Co, Dar-es-Salaam

For the respondent:

RC Kesaria

RC Kesaria, Dar-es-Salaam

Mukasa v Ocholi
[1968] 1 EA 89 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	15 March 1968
Case Number:	12/1967 (37/68)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Appeal – Magistrates' courts – Civil appeal from grade III magistrate to grade II magistrate and further appeals to chief magistrate and thence to High Court – Decree must be extracted or appeal incompetent – Magistrates' Courts Act 1964, s. 32 (1); Civil Procedure Act, s. 2 (U.).

[2] Appeal – Decree – Civil appeal to High Court from magistrates' courts – Decree must be extracted or appeal incompetent – Magistrates' Courts Act 1964, s. 32 (1); Civil Procedure Act, s. 2 (U.).

Editor's Summary

This fourth appeal was brought to the High Court in a case originating in the court of a grade III magistrate. No decree had ever been extracted.

Held –

- (i) section 32 of the Magistrates' Courts Act 1964 gives a right of appeal against a "decree" and a formal decree must be extracted;
- (ii) this not having been done, the appeal should be struck out as incompetent.

Appeal struck out with no order as to costs.

Cases referred to in judgment:

- (1) *Alexander Morrison v. M. S. Versi and Another* (1953), 20 E.A.C.A. 26.

(2) *Kiwege and Mgude Sisal Estates Ltd. v. M.A. Nathwani* (1952), 19 E.A.C.A. 160.

Judgment

Sheridan J: The respondent successfully sued the appellant over a land dispute before a grade III magistrate at Kachanga. The appellant successfully appealed to the magistrate grade II. The respondent won a further appeal to the chief magistrate at Mbale. The appellant now seeks to appeal to this court.

I raised a preliminary point that civil appeals from Magistrates' Courts are now governed by s. 32 (1) of the Magistrates' Courts Act 1964 (Act 38). That section gives a right of appeal from a decree or any part of a decree or an order of (a) a magistrate's court presided over by a chief magistrate or a magistrate grade I in the exercise of its original or appellate civil jurisdiction to the High Court. Paragraphs (b) and (c) give right of appeal from a magistrate grade III to a magistrate grade II and from a magistrate grade II to a chief magistrate.

Counsel for the appellant concedes that no decree has been extracted, as is required by the section. He points out that no decrees were extracted as a result of the appeals from the judgments of the lower courts, and that to insist on a decree would cause hardship to an appellant who, more often than not, is unaware of this technical provision of the law.

Under the African Courts Ordinance 1957, as amended by the African Courts (Amendment) Ordinance 1962 (No. 12 of 1962), s. 30 (2), an appeal lay to the High Court from an appellate *decision* of the district African court. This is to be contrasted with s. 32 of the Magistrates' Courts Act 1964 which provides for an appeal from any *decree*. The Magistrates' Courts Act, s. 35 repealed the African Courts Ordinance. I doubt whether the legislature realized the implications of the change in the wording of the law.

The Civil Procedure Act, s. 2, defines "decree" as "the formal expression of adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final."

There is ample authority for saying that a court has no jurisdiction to entertain an appeal where a decree embodying the terms of judgment has not been drawn up: *Alexander Morrison v. M. S. Versi and Another* ((1953), 20 E.A.C.A. 26). Without a decree an appeal is incompetent and premature: *Kiwege and Mgude Sisal Estates Ltd. v. M. A. Nathwani* ((1952), 19 E.A.C.A. 160).

An appeal is of course a creature of statute. Although in the two above cases the East African Court of Appeal dismissed the appeals, I think that the more appropriate order in this case would be to strike out the appeal as incompetent, as the merits have not been gone into, and to leave it to the appellant to try and resurrect his appeal, if he can, by extracting a decree and then, if necessary, applying to appeal out of time under s. 80 of the Civil Procedure Ordinance. Alternatively, he may seek to set aside the judgments of the two lower courts on the same ground that no decree was extracted. Accordingly the appeal is struck out as premature.

I make no order as to costs as the respondent himself, in excusable ignorance of the change in the provisions of the law, did not extract a decree when he appealed from the grade II magistrate to the chief magistrate.

Appeal struck out.

For the appellant:

Z Mohamed

Z Mohamed & Co, Mbale

The respondent in person.

Keeka v Damji
[1968] 1 EA 91 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	30 August 1967
Case Number:	12/1967 (31/68)
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] *Costs – Criminal case – Whether advocate’s costs for services rendered in a criminal case can be ordered to be taxed – Advocates Ordinance, ss. 2, 61 and 62; Rules of Court (Advocates’ Remuneration and Taxation of Costs Rules), Part II (T.).*

[2] *Costs – Taxation – Criminal case – Whether advocates costs for services rendered in a criminal case can be ordered to be taxed – Whether “contentious proceedings” – Advocates Ordinance, ss. 2, 61 and 62; Rules of Court (Advocates’ Remuneration and Taxation of Costs Rules), Part II (T.).*

Editor’s Summary

This was an application by the executrix of a deceased advocate for an order that a bill of costs be taxed. The bill was for professional services rendered by the advocate to the respondent in a criminal case in which the respondent was the accused. No prior agreement had been made about costs. An objection was raised by the respondent that there is no provision for the taxation of costs in criminal matters.

Held – the Advocates’ Remuneration and Taxation of Costs Rules do not apply to costs in criminal cases (*Chitale v. Vithalbhair M. Patel* (1) followed).

Application dismissed with costs.

Cases referred to in judgment:

- (1) *Chitale v. Vithalbhair M. Patel* (1929), 1 T.L.R. 559.
- (2) *Re Jackson*, [1915] 1 K.B. 371; [1914–15] All E.R. Rep. 959.
- (3) *Sib Kishore Ghose v. Manik Chandra Nath*, A.I.R. 1916, Calcutta 669.

Judgment

Hamlyn J: This is an application made by the executrix of the estate of Dara F. Keeka, deceased, at one time an advocate of this court. The application is supported by the usual affidavit and prays that this court may make an order that a bill of costs (annexed to the application) be taxed by the court. The bill refers to matters undertaken professionally by the deceased advocate prior to his death and, if that were all, it would present no difficulty. What makes the application so novel, however, is that the bill of costs concerns a criminal case heard in the Dodoma District Court, which the executrix of the estate desires to be taxed as against one Mohamedali Nasser Damji, the accused in the criminal proceedings referred to.

I was referred by learned counsel for the respondent to the case of *Chitale v. Vithalbhaji M. Patel* ((1929), 1 T.L.R. 559) in which the court said:

“The rules (the Advocates’ Remuneration and Taxation of Costs Rules 1921) contain nothing referring to or embracing remuneration in respect of services in criminal matters. No service or work of any sort comes within any of the schedules.”

Learned counsel for the applicant, however, argued that he comes before this court under the Advocates Ordinance which nowhere excludes criminal cases from its application: he further points out that the word “costs” in s. 2 of that Ordinance is very widely defined.

The bill of costs annexed to the chamber application now before the court and which is stated to be filed under s. 62 of the Advocates Ordinance (Cap. 341), is clearly drawn in respect of what are termed “contentious proceedings”. There is neither in the Rules of Court nor in the Advocates Ordinance any definition of such term. The Supreme Court Costs Rules 1959, of England, which provide for matters of costs and their taxation, define “contentious business” as follows:

“ ‘Contentious business’ means business done, whether as solicitor or advocate, in or for the purposes of proceedings begun before a court or before an arbitrator appointed under the Arbitration Act 1950, not being business which falls within the definition of non-contentious or common form probate business contained in subsection (1) of section one hundred and seventy five of the Supreme Court of Judicature (Consolidation) Act 1925.”

A reading of the relevant clauses of the Act makes it clear that the matter of costs and taxation thereof is concerned purely with contentious *civil* actions and has nothing whatever to do with criminal proceedings.

It is true that in the King’s Bench Division case of *Re Jackson* ([1915] 1 K.B. 371) the court spoke of “a bill of costs in connexion with criminal proceedings”. That however was a matter somewhat different from the present case, in that a solicitor had entered into an arrangement with his client (who had been arrested on a charge of embezzling) whereby the sale proceeds of the accused’s furniture should be received by the solicitor to “cover the charges and disbursements of the defence”. On the particular wording of the document, the court held that there was no agreement as to the costs, but that the money was an arbitrary sum held by the solicitor as a “cover” for whatever his charges might amount to.

I have referred to this case because, though the circumstances which gave rise to it differ entirely from the present application, the two cases have one point in common, namely, that there was in each case no prior agreement as to costs between the advocate and the client. I think that it is this absence of a written agreement which has misled the personal representative into seeking taxation of her bill of costs.

Under the English Costs in Criminal Cases Act 1952 and in the Poor Prisoners’ Defence (Defence Certificate) Regulations 1960 provision is made, in certain circumstances, for the taxation of costs incurred in criminal proceedings. The latter Regulations are to some extent reproduced in this country’s Poor Prisoners’ Defence Ordinance, Cap. 21, under s. 5 of which an advocate who is assigned to defend a poor person may present his “account of expenditure” to the registrar who “considers the claim”. That however does not concern the present application, which does not arise from any assigned defence of a poor person, nor indeed, in the absence of rules made under s. 6 of that Ordinance, is any question of taxation contemplated in respect of counsel’s expenditure in the defence.

In my opinion this is a matter (in view of the absence of agreement) which perhaps could be regarded as one of reasonable remuneration on an implied promise: *Sib Kishore Ghose v. Manik Chandra Nath* (A.I.R. 1916, Calcutta 669). It cannot fall within the rules which govern the taxation of costs, for these do not apply to the instant case. The application is consequently dismissed, the respondent being allowed his costs therein.

Order accordingly.

For the applicant:

PR Dastur

For the respondent:
NA Velji

Mbogo and another v Shah
[1968] 1 EA 93 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 21 September 1967
Case Number: 5/1967 (39/68)
Before: Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by: LawAfrica

[1] *Appeal – Discretion – Appeal to Court of Appeal against exercise by Judge of discretion – Principles to be applied.*

[2] *Insurance – Motor insurance – Notice under Insurance (Motor Vehicles Third Party Risks) Act, s. 10 (2) (a) – Whether injured party should give further notice before filing suit (K.).*

[3] *Insurance – Motor insurance – Whether and when insurer entitled to have ex parte judgment against insured set aside for lack of notice to insurer.*

[4] *Practice – Ex parte judgment – Setting aside – Principles upon which Court acts – Civil Procedure (Revised) Rules 1948, O. 9, and r. 10 (K.).*

[5] *Practice – Notice of intention to sue – Notice to insurer under Insurance (Third Party Risks) Act of institution of suit – Whether further notice to insurer necessary – Whether in absence of further notice insurer can have ex parte judgment against insured set aside.*

[6] *Practice – Substituted service – On defendant in running-down action – Insurers should also be ordered to be served.*

Editor's Summary

The respondent was knocked down and injured by a vehicle which was owned by the first appellant and driven at the time by the second appellant. The respondent notified the insurance company of the vehicle that he intended to hold that company liable to compensate him, and he served it with a notice under the Insurance (Motor Vehicles Third Party Risks) Act, s. 10 (2) (a). The company in correspondence denied liability. The company's advocate, however, refused to accept service of the proceedings filed by the respondent against the appellants and service was effected by advertisement. No appearance was entered and no defence was filed, and the respondent obtained judgment *ex parte* against the appellants, which the insurance company then applied to set aside. Its application was refused by the High Court (reported at [1967] E.A. 116). It then brought this appeal against that refusal.

Held –

- (i) in the circumstances the judge exercised correctly his discretion to refuse the application to set aside the judgment (statement of Harris, J. in *Kimani v. McConnell* (2) approved);
- (ii) (per Newbold, P.) a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice;
- (iii) (per Law, J.A.) in cases of this type, where substituted service on a defendant is ordered, there should be included an order that his insurers be also served.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Evans v. Bartlam*, [1937] 2 All E.R. 646.
- (2) *Kimani v. McConnell*, [1966] E.A. 547.
- (3) *Groom v. Crocker*, [1939] 1 K.B. 194; [1938] 2 All E.R. 394.

(4) *Murfin v. Ashbridge*, [1941] 1 All E.R. 231.

September 21, 1967. The following ex tempore judgments were delivered:

Judgment

Sir Clement De Lestang V-P: The facts giving rise to this appeal are as follows. An insurance company (hereinafter called the company) was at the material time the insurer of the first appellant's motor vehicle which, while being driven by the second appellant, the servant of the first appellant, on January 10, 1965, knocked down the respondent and injured him. The company was informed of the accident both by the insured and by the first appellant. The respondent made it quite clear from the beginning that he held the company liable to compensate him for his injuries. About three months later the respondent requested the company to admit liability, failing which a suit would be filed against the appellant but the company was not prepared to do so. On the contrary it alleged that the accident was due entirely to the negligence of the respondent. Nevertheless the company caused the respondent to be examined by its own doctor but apparently did not honour its promise to let his advocate have a copy of the doctor's report although the company itself had been furnished with a copy of the respondent's examination by his own doctor.

On October 5, 1965, the company was served with a notice, that is to say, the notice required by s. 10 (2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act, without which it would not have been liable to satisfy any judgment obtained by the respondent against the insured. Shortly before the company's advocate was asked if he would accept service on behalf of the insured and his driver. The advocate declined on the ground that he had no instructions. On November 5, 1965, the respondent filed a suit against the appellants service of which was by order of the court effected by advertisements. Neither appellant entered appearance or filed a defence to the suit. As a result, on July 18, 1966, judgment was entered against both appellants, by default after formal proof of the accident and of the damages.

When the respondent sought to enforce the judgment against the company it applied to the High Court under O. 9, r. 10 of the Civil Procedure (Revised) Rules 1948 to set it aside and to grant it leave to defend in the name of the appellants. The learned judge who heard the application was the same judge who had entered judgment. He did not doubt the right of the company as an interested party to bring the application nor did he doubt his power to grant it if he chose to do so. He refused it, however, on the ground, as I understand his judgment, that while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to obstruct or delay the course of justice which, in his view, the company had done in the present case. Order 9, r. 10 gives the High Court an unfettered discretion to set aside or vary an *ex parte* judgment (*Evans v. Bartlam*, [1937] 2 All E.R. 646) and it was in the exercise of his discretion that the learned judge refused the application. I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view, it has failed to do.

In the present case there are factors both for and against the learned judge's decision. The principal matters against his decision are first, the fact that the company was not notified of the actual filing of the

suit against the appellants.

It was merely notified about a month previously of the intention to file the suit and second the fact that from the very beginning the company let the respondent know that it wanted to defend the action, disclosed its defence and gave all the information which the respondent sought and did not delay the filing of its application to set aside the judgment. The principal matters supporting the decision are the fact that a notice of intention to sue was served on the company and its refusal to accept service on behalf of the appellants, and its failure to give any explanation for so doing in its application to have the judgment set aside. In the normal course of things the company would have had to defend the action if it really wanted to avoid liability and it is difficult to understand, without any explanation, why it adopted that attitude. Obviously this latter factor greatly influenced the learned judge and led him to conclude, when taken together with the conduct of the company as a whole, that it was trying, as he put it, to obstruct or delay the course of justice.

In these circumstances, when there are matters both in favour and against the exercise of its discretion by the court below, it is very difficult for this court to say that its decision is wrong and although I myself might have come to a different conclusion there is room for a divergence of views and I am not prepared to hold that the order was clearly wrong.

I would accordingly dismiss this appeal.

Sir Charles Newbold P: Two questions arise on this appeal. The first is the circumstances which would justify a judge granting an application made under O. 9, r. 10, to set aside a judgment entered *ex parte*; the second is the circumstances in which this court, as a Court of Appeal, would interfere with the exercise of the discretion of a judge made on any such application.

Dealing with the first question, it is quite clear that the judge has a discretion under O. 9, r. 10, but of course he has got to exercise that discretion judicially. In *Kimani v. McConnell* ([1966] E.A. 547), Harris, J., dealing with the question as to the circumstances to be borne in mind by a judge on an application under that rule, said this (*ibid*, at p. 555 G):

“... in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.”

This is a very broad statement of the matters to be considered by a judge on such an application and I agree with it. Here, as the Vice-President has already said, there were factors on each side. On the one side, it seems to me the most relevant factor is that the insurance company had always made it clear that on the story it had received of the accident there was no negligence on the part of its insured, and thus no liability on the part of the insurance company to the injured person. On the other side the most material factor, it seems to me, was the fact that inasmuch as the insurance company had a contractual right to take over the conduct of any suit and obviously would do so for its own protection, yet having been offered an opportunity to accept service in a letter dated August 5, 1965, from the advocates for the plaintiff, it in effect refused that offer by a letter from its advocates dated September 1, 1965.

Now it is urged by counsel for the appellants in an able address that there is a distinction to be drawn between the refusal of the insurance company to accept service of a writ and the refusal of an insurance company to take any part in proceedings after it knows that a writ has been issued. The basis for that distinction is stated to be the case of *Groom v. Crocker* ([1939] 1 K.B. 194). For myself I do not consider that that case draws any such distinction. All that

that case decides on this point is that if an insurance company chooses to conduct a defence, whether or not it comes into the proceedings at an earlier or a later stage, in such a manner as to be contrary to the interests of the insured, then the insurance company has got no-one to blame but itself if it becomes liable on any ground, in that case on the ground of a tort, for the action which it has taken. I see nothing in that case which leads me to draw any such distinction as counsel for the appellants sought to draw; nor apart from that case do I see any good reason to draw such a distinction. In fact, it would seem to me that one of the obvious reasons for that contractual right, which appears in most insurance policies, is to enable the insurance company to come into the picture at the earliest possible moment. If it does not choose to take advantage of that right which it has so carefully acquired by contract with its assured, then it has no-one but itself to blame if it suffers thereby. This was the factor which I think above all others persuaded the trial judge that he should not exercise his discretion and re-open the case setting aside the *ex parte* judgment.

The judge also referred to other factors. Delay and its possible effect in relation to witnesses are, of course, factors to be borne in mind in determining whether, looked at as a whole, the justice to the case requires that the case be re-opened so as to try it on its merits. But I think, by and large, the main factor which decided the judge not to re-open the case was this act of the insurance company in refusing to accept service of the proceedings, which act was the direct reason why this case came to judgment *ex parte* and not after consideration of contested facts. One must not forget that justice looks both ways and very often a judge has to draw a line between two rather conflicting cases, each of which has some justice on its side. Now that is what the judge did in this case. As the Vice-President has said, it may be another judge would not have decided the matter in the same way; but this judge, in the exercise of his discretion, without taking into account any factor which I think was an improper factor to take into account, and without failing to take into account any matter which he should have taken into account, arrived at this decision. It is now sought to set aside this decision which was made under the exercise of a discretion.

We come now to the second matter which arises on this appeal, and that is the circumstances in which this court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Like the Vice-President, I cannot see that such a position exists in this case. Indeed, while I can conceive of a judge exercising his discretion in a matter differently from that in which the trial judge did in this case, for myself I would have exercised it in the same way.

For these reasons I agree with the Vice-President and I would dismiss the appeal.

Law JA: I agree with the judgments which have been delivered by my lords the President and Vice-President, and I would only add a few observations.

Counsel for the appellants has submitted that nothing that happened before the filing of the suit has any relevance to the application to set aside the *ex parte* judgment. I respectfully disagree. It was in my view clearly relevant that the insurance company refused to accept service of the summons on behalf of the defendants, and that only a month before the plaint was filed a notice was served

on the company informing them that a suit was being instituted. These are all matters which the judge was entitled to take into consideration, as he did, in deciding whether the interests of justice required him to allow the company to re-open the case by setting aside the *ex parte* judgment obtained by the respondent. The courts' power to set aside a judgment under O. 9, r. 10, is an unconditional discretionary power, and this court will not interfere with the exercise of such a discretion unless clearly satisfied that the judge was wrong. I can only say that I am not so satisfied and I would accordingly dismiss this appeal.

To obviate the position arising again which arose in this case, I would repeat the advice of Goddard, L.J. (as he then was) in *Murfin v. Ashbridge* ([1941] 1 All E.R. 231) that in cases of this type, where substituted service on a defendant is ordered, there should be included an order that his insurers be also served.

Appeal dismissed with costs.

For the appellants:

JM Nazareth, QC and JK Winayak

JK Winayak & Co, Nairobi

For the respondent:

DN Khanna

Khanna & Co, Nairobi

Patel v Republic [1968] 1 EA 97 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	15 December 1967
Case Number:	158/1967 (12/68)
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Ainley, CJ and Chanan Singh, J

[1] *Appeal – To the High Court – Criminal Appeal by prosecution – Right of Attorney General on a matter of law – Whether the right granted by Criminal Procedure Code (Amendment) Act 1967, s. 3 (K.) is retrospective in operation.*

[2] *Criminal law – Dangerous driving – Car suddenly swerving to the right – Previously driven in a cautious and orderly manner – Magistrate holding no case to answer – Whether accused must offer an explanation – Traffic Act, s. 47 (1) (K.).*

[3] Criminal practice and procedure – Appeal by the Attorney General – Procedure by case stated abolished – Whether this legislation is retrospective in operation – Criminal Procedure Code, s. 348A (K.).

[4] Road Traffic – Dangerous driving – Sudden swerve – Accused driving in a cautious and orderly manner – Car suddenly swerving across road – Magistrate holding no case to answer – Whether accused required to give an explanation – Traffic Act, s. 47 (1) (K.).

[5] Statute – Retrospective operation – Procedural matter – Criminal Procedure Code (Amendment) Act, s. 3 (K.).

Editor's Summary

The appellant was charged with driving a car in a manner dangerous to the members of the public contrary to s. 47 (1) of the Traffic Act. The evidence showed that the appellant was driving in a cautious and orderly manner on a wet road but that, suddenly, the car skidded to the right and collided with a car which was being driven in the opposite direction on its correct side of the road. The magistrate accepted the evidence and at the close of the case for the

prosecution, dismissed the charge on the grounds that the prosecution had not made out a sufficient case against the accused to put him on his defence. The State appealed to the High Court against the decision. The appellant opposed that appeal in the High Court on two grounds, first that the court had no jurisdiction as the procedure in the High Court should have been by case stated, the legislation abolishing this process and substituting a right to the Attorney-General to appeal on a matter of law not having passed until a few days before the appeal; and secondly that the decision of the magistrate was a correct decision and should not be interfered with. The High Court allowed the appeal and remitted the case to the magistrate. The appellant then appealed to the Court of Appeal.

Held –

- (i) the change made by s. 3 of the Criminal Procedure (Amendment) Act 1967 was a change in a procedural matter and not a change in a matter conferring or creating a new substantive right;
- (ii) normally a procedural change operates retrospectively and the words “has been acquitted” used in the section carry an implication of retrospective operation; the case was therefore rightly brought by way of appeal to the High Court;
- (iii) no reason had been given by the accused for the car skidding or swerving into the oncoming vehicle and unless some explanation was given there was patent evidence of dangerous driving;
- (iv) the case should therefore be remitted to the magistrate with directions to proceed with the trial.

Appeal dismissed and order of High Court confirmed.

Cases referred to in judgment:

- (1) *Mombasa v. Nayli Ltd.*, [1963] E.A. 371.
- (2) *R. v. Evans*, [1962] 3 All E.R. 1086.
- (3) *R. v. Spurge*, [1961] 2 All E.R. 688.
- (4) *R. v. Ball* (1966), 50 Cr. App. Rep. 266.
- (5) *Merali v. Uganda*, [1963] E.A. 647.
- (6) *Nathani v. Republic*, [1965] E.A. 777.

Judgment

Sir Charles Newbold P: delivered the following judgment of the Court: The appellant was charged with driving a car in a manner dangerous to the members of the public having regard to all the circumstances of the case, contrary to s. 47 (1) of the Traffic Act (Cap. 403). At the close of the case for the prosecution the magistrate, suo motu, dismissed the charge, holding that he did not consider that the prosecution had made out a sufficient case against the accused for him to enter on his defence. The evidence led by the prosecution, so far as is relevant to the circumstances of the charge, consisted basically of the evidence of two witnesses. One of them, Mr. Kariuki, was a passenger in the appellant’s car and he said that the car had been driven in a normal manner when it suddenly skidded to the right and something, which he had not previously seen, hit them and thereafter he became unconscious. He said that immediately before the accident the appellant was driving in a careful and cautious manner, at a reasonable speed, and that the

road was straight. He gave no reason as to why the car had suddenly skidded to the right. The other witness was Doctor Sethi, who stated that he was driving in the direction opposite to that in which the appellant was driving, that he noticed some hundreds of yards away the appellant's car proceeding in an ordinary manner, that the road was wet, and that when the appellant's car was close to him it suddenly swerved across the road in front of his car and as a result a collision took place. From

that evidence, the facts which we assume the magistrate found and which, as appears from the judgment of the High Court, the High Court accepted as being found by the magistrate, were that the road was wet, that the appellant's car, prior to taking this action of crossing the road, was being driven at a reasonable speed in a normal manner and then, immediately in front of another car going in a contrary direction, it crossed the road, whether by way of a skid or a swerve is not clear, and as a result of that the accident occurred. As we have said, on that evidence the magistrate, *suo motu*, held that there was no case for the appellant to answer. From that decision the State appeals.

We should here state that originally the appeal procedure was by way of case stated. A few days before the case stated was to be heard, the procedure to be adopted by the State for bringing a decision of a subordinate court before the High Court by way of case stated was abolished and instead a right of appeal to the High Court was given on a matter of law. This change in the legislation took place as a result of the Criminal Procedure Code (Amendment) Act 1967, s. 3, which inserted a new subsection 348A in the Code and s. 5, which repealed the case stated procedure. The new section reads as follows:

"348A. When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney-General may appeal to the High Court from such acquittal or order on a matter of law."

As we have said, the course at first pursued by the Republic was to seek to bring the matter before the High Court by way of case stated but when, however, that procedure was abolished, they then brought the matter, having first obtained leave from the High Court, by way of an appeal in accordance with the provisions of the new section.

Before the High Court counsel for the appellant urged two matters. First, that the High Court had no jurisdiction to hear the appeal, and, secondly, that the decision of the resident magistrate was a correct decision and should not be interfered with. The High Court decided against counsel on both of those submissions, holding first, that it had jurisdiction, and, secondly, that the order of the magistrate was wrong; and the High Court remitted the case to the magistrate with directions that the magistrate proceed with the trial. From that decision counsel appeals to this court. This, of course, is a second appeal and therefore lies only on a question of law. It is not disputed that the matters urged by counsel do raise questions of law.

The first matter for consideration is whether the High Court had jurisdiction to entertain this appeal. That question is to be determined by consideration of the intention of the legislature when it enacted s. 348A.

As Newbold, J.A. (as he then was) said in *Mombasa v. Nyali Ltd.* ([1963] E.A. at p. 374):

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, *prima facie* it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."

It has been urged for the State that what s. 348A does is merely to affect the procedure of bringing the decision of a subordinate court before the High Court. Counsel for the appellant, on the other hand, has urged that it has given a right of appeal which did not exist before and that a right of appeal cannot be procedural but is a substantive right. In our view s. 348A deals merely with a procedural matter. We would like to emphasise that the procedure by way of case stated formerly given enabled the Republic to bring a decision of a resident magistrate before the High Court on a question of law. What s. 348A does is to give a right of appeal on a matter of law. It does not give a right of appeal on a matter of fact. We express no opinion as to what would be the position if the right to appeal had been a wide and unfettered one. But we are clearly of the view that all that has occurred is a change in the procedure of bringing before the High Court for consideration on a matter of law a decision of a subordinate court. We consider therefore that all that has been changed is a procedural matter and not a matter conferring or creating a new substantive right. As is stated in the *Mombasa v. Nyali* (*supra*), judgment to which we have already referred, since the change is purely on a matter of procedure, normally, unless there is good reason to the contrary, that procedural change would operate retrospectively. The precise length of retrospective time we need not discuss in this case. There is, however, as has been urged by counsel for the respondent, a further matter for consideration. While the normal rule is that a procedural matter operates retrospectively, as we have already pointed out, it is basically a matter for the intention of the legislature. Counsel for the respondent has referred to the words of the section themselves and the use of the words “has been acquitted” and “has been made” in the section. He has pointed out that those words must carry an implication of retrospective operation because from the moment that the amending Act came into force it must apply and it can only apply to something or some decision which was given before the Act came into force. His submission is that when an examination is made of the terms of the section that reinforces the effect of the canon of construction and shows that the intention of the legislature was to give in this particular case this section retrospective operation. We agree that the wording of the section adds weight to what we have already said. For these reasons we consider that the appeal, in so far as it relates to the question of the jurisdiction of the High Court, fails.

Turning now to the second ground urged by counsel for the appellant, at the conclusion of his submissions we did not call upon counsel for the respondent to answer them for the following reasons. The section under which the appellant was charged reads:

“Any person who drives a motor vehicle on a road . . . at a speed or in a manner which is dangerous to the public . . . having regard to all the circumstances of the case . . . shall be guilty of an offence.”

Reference has been made to two English cases, the cases of *R. v. Evans* ([1962] 3 All E.R. 1086) and *R. v. Spurge* ([1961] 2 All E.R. 688) and a third English case, *R. v. Ball* ((1966), 50 Cr. App. Rep. 266). In those cases the courts held that the test to determine whether or not any driving was dangerous was an objective test; indeed, in one of the cases the court went to the extent of saying that even if the driver was “blameless” nevertheless, if, in fact, the driving was dangerous an offence had been committed. Counsel for the appellant attacked the decisions in those cases and submitted that the law of Kenya was not that set out in those cases in England.

We desire to say as little as possible about the facts of this case because we have come to the conclusion that the appeal should be dismissed and the result, of course, of the dismissal of the appeal is that the matter will come before the

magistrate again. For these reasons we desire, as we have said, not to express at any great length our views upon the matter but it is necessary, in order to deal with counsel for the appellant's submissions, to say this. If on the plain facts, as shown by the evidence, the act done by the driver is one which any reasonable person in the absence of any explanation would say is a dangerous piece of driving, then that driving is dangerous within the terms of s. 47. But if by reason of some explanation given, whether that explanation be obtained from the evidence for the prosecution or for the defence, it is clear that for all practical purposes the driver at the time when the act was committed did not have control of the vehicle for reasons beyond his control, then that would be a defence to the charge. Now before the accident, as we have already said, the road was wet and the car was being driven in a normal way at a reasonable speed; and then it suddenly skidded or swerved across the road in front of an oncoming vehicle. It is well-known that cars, even on a wet road, do not skid or swerve without reason. It is also well-known that for no reason at all cars do not turn into an oncoming vehicle. Unless an explanation is given which shows that for all practical purposes the driver of the car was not, for reasons beyond his control, in control of it, turning immediately in front of an oncoming vehicle is, on the face of it, a patently dangerous manoeuvre. In the circumstances given on such evidence as there is here, the only apparent explanation in defence which could arise is the fact that the car did develop a skid. As we have already pointed out, a car does not develop a skid unless there is some reason for it; and the fact that the road was wet is not of itself a reason for a skid. Therefore there has been no explanation whatsoever, even on the assumption that the car did skid, which shows that for reasons beyond the control of the appellant his car suddenly left its side of the road and went into the path of an oncoming vehicle with the result that an accident occurred. On those facts, in the absence of any explanation which shows that the appellant, for reasons beyond his control, lost control of the car, we consider that there was patent evidence upon which the court must convict the appellant of dangerous driving. We consider, therefore, that the High Court was correct in making the order that it did. Counsel for the appellant has urged that the High Court should make such an order unless the decision of the resident magistrate was perverse. We do not know whether we would go to that extent. As was set out in the judgment of the Vice-President, Sir Trevor Gould, in *Merali v. Uganda* ([1963] E.A. at p. 648):

"The question of law for the High Court was whether the decision of the magistrate that no *prima facie* case had been made out was one at which a reasonable court, properly directing itself, could arrive."

We consider that no reasonable court, properly directing itself, on the evidence which it had before it could possibly arrive at an order for acquittal.

Reference has also been made by counsel for the appellant to, and he has stressed a passage in the judgment of the then Vice-President, Newbold, V.-P., in, *Nathani v. Republic*. In that passage appear these words ([1965] E.A. at p. 781):

"There are, however, many circumstances in which the facts proved by the prosecution are such as, in the absence of explanation, leave no doubt in the mind of the judge or magistrate that the accused is guilty."

We would adopt those words. For the reasons we have already given we would say that on the evidence as it stands at present at the close of the prosecution the facts proved by the prosecution are such that in the absence of any other explanation, should leave no doubt in the mind of the magistrate that the appellant was guilty. In other words, the appellant should have been called upon to make his defence. He may indeed make a perfectly good defence. It may well

be that he will give a perfectly reasonable explanation for the car swerving across the road in front of an oncoming vehicle, an explanation which shows that not merely is he not to blame, but that, for all practical purposes, he had lost control of the car for circumstances beyond his control. But that is a matter for him to lead evidence, to displace the position as it existed at the termination of the case for the prosecution. For these reasons we are of the view that the High Court was correct. Accordingly we dismiss the appeal and confirm the order of the High Court.

Appeal dismissed.

For the appellant:

H Shroff

Hoshang Shroff, Nairobi

For the respondent:

HGD Graham

Attorney-General, Kenya

Osman v the United India Fire and General Insurance Company Ltd **[1968] 1 EA 102 (CAD)**

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	11 November 1967
Case Number:	32/1957 (15/68)
Before:	Sir Clement de Lestang V-P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Saidi, J

[1] *Costs – Appeal – New ground – Ground not argued in lower court and not in notice of appeal but raised with leave at last moment in course of argument – Proper order for costs where appeal succeeds on such ground.*

[2] *Limitation – Extension of period – Whether period under Civil Procedure Code, O. 22, r. 4 can be extended – Whether Court has inherent power to extend any period – Indian Limitation Act 1908, ss. 3 and 5 (T.).*

[3] *Limitation – Deceased defendant – Period for application by plaintiff to substitute legal representative of deceased as party – Period of time after death of deceased defendant within which such application must be made – Indian Limitation Act 1908, art. 177 (T.).*

[4] *Practice – Deceased defendant – Period of limitation for application to substitute executor – Indian Limitation Act 1908, Art. 177; Civil Procedure Code 1966, O. 22, r. 4 (T.).*

[5] Statutes – Interpretation – Conflict of texts – Whether version of Indian Act published by Superintendent of Government Printing or version published in Gazette of India to be applied where texts differ – Indian Limitation Act 1908, art. 177 (T.).

Editor's Summary

The respondents, as plaintiffs in a suit, applied to the High Court for leave to substitute for the name of the defendant, who had died, the name of the appellant, the executor of his will. The application was made four months and one week after the death of the defendant. The judge held that the period of limitation applicable was that prescribed under art. 177 of the Indian Limitation Act 1908, and that the period was ninety days. He nevertheless allowed the application, however, because he considered that the interests of justice so required. Against that decision the appellant brought this appeal, contending that the judge had

no jurisdiction to allow the application. The respondents did not file a notice of cross-appeal but were allowed at the hearing to cross-appeal on the ground that the period of limitation was six months and not ninety days.

Held –

- (i) section 3 of the Indian Limitation Act 1908, being mandatory, and s. 5 of that Act not having been made applicable to applications under O. 22, r. 4, it was not open to the Court to extend the period of limitation (*Maqbul Ahmad v. Onkar Pratap* (1) applied);
- (ii) where (as here) the text of the Indian Limitation Act 1908 (as amended) as published by the Superintendent of Government Printing of India differs from that as published in the *Gazette* of India, then the text as published in the *Gazette* must prevail (*Gobind Das v. Rup Kishore* (2) applied);
- (iii) therefore the correct period of limitation for an application to have the legal representative of a deceased defendant made a party to a suit under O. 22, r. 4 is six months.

Appeal dismissed with no order as to costs. Cross appeal allowed and decision of court below affirmed on different grounds.

Cases referred to in judgment:

- (1) *Maqbul Ahmad v. Onkar Pratap*, A.I.R. 1935, P.C. 85.
- (2) *Gobind Das v. Rup Kishore*, A.I.R. 1924, Lah. 65.
- (3) *Das v. Chand*, A.I.R. 1925, All. 77.
- (4) *Khan v. Skinner*, A.I.R. 1925, All. 263.
- (5) *Prasad v. Prasad*, A.I.R. 1927, Pat. 142.
- (6) *Mer v. Chettiar*, A.I.R. 1926, Mad. 65.
- (7) *Din v. Kesharlal*, A.I.R. 1923, Bom. 299.
- (8) *Khemka v. Manmul*, A.I.R. 1924, Cal. 74.

November 11, 1967. The following considered judgments were read:

Judgment

Law JA: This is an appeal with leave of the High Court of Tanzania from a decision of a judge of that court (Saidi, J.) allowing an application by the plaintiffs in a suit to substitute for the name of the defendant the name of the executor of his will. The application was made under O. 22, r. 4 of the Civil Procedure Code 1966, of Tanganyika, sub-r. (3) whereof reads as follows:

- “(3) where within the time limited by law no application is made under sub-r. (1), the suit shall abate against the deceased defendant.”

The application to make the executor a party to the suit was made four months and one week after the death of the deceased. The learned judge held that the period of limitation applicable was that prescribed under art. 177 of the Indian Limitation Act 1908, which he held to be ninety days, and although the

application was in his view barred by limitation the learned judge nevertheless allowed it, because he considered that the interests of justice so required. Against this decision the executor (whom I shall refer to hereinafter as the appellant) now appeals, the main ground of appeal being that as the application was barred by limitation, and as s. 5 of the Limitation Act, which empowers courts in certain circumstances to extend time, was not applicable to applications under O. 22, r. 4, the judge's decision in this case was made without jurisdiction and should be set aside.

Although the plaintiffs (hereinafter referred to as the respondents) had not contended in the court below that the period of limitation was other than ninety days, and had not filed a notice of cross-appeal challenging the judge's finding to this effect, we allowed an application by counsel for the respondents,

under r. 65 (3) of the rules of this court, to cross-appeal on the following ground:

“That the period of limitation applicable to applications under O. 22, r. 4 is six months and not ninety days as held by the learned judge”;

making it clear at the same time that if the appeal was dismissed because of this ground succeeding, the respondents might be put on terms as to costs.

Speaking for myself, I have no doubt that the main ground of appeal should succeed. By s. 3 of the Indian Limitation Act 1908, as applied to Tanganyika, every application made after the period of limitation prescribed therefor shall be dismissed. This section is mandatory. By s. 5 of that Act, an application to which the section may be made applicable by any enactment or rule may be admitted after the period of limitation prescribed therefor, if the applicant satisfies the court that he had sufficient cause for not making the application within such period. It is common ground that s. 5 has not been made applicable to applications under O. 22, r. 4 by any enactment or rule. The learned judge appreciated this, but appears nevertheless to have extended time in the purported exercise of a general discretion under his inherent powers. In my opinion it was not open to him to do so. In *Maqbul Ahmad v. Onkar Pratap* (A.I.R. 1935, P.C. 85), Lord Tomlin, in delivering the Board’s opinion, said with reference to the Limitation Act (*ibid.* at p. 88):

“In their Lordships’ opinion it is impossible to hold that in a matter which is governed by Act, an Act which in some limited respects gives the court a statutory discretion, there can be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. It is to be noted that this view is supported by the fact that s. 3 of the Act is peremptory and that the duty of the court is to notice the Act and give effect to it . . .”

I respectfully agree with those observations. Clearly if the period of limitation applicable to applications under O. 22, r. 4, is ninety days and s. 5 of the Limitation Act has not been made applicable to applications under that rule, then a court has no residual or inherent jurisdiction to extend this period beyond the period limited by law.

It remains to consider the point raised in the cross-appeal, because if the period of limitation is six months and not ninety days, the application the subject of this appeal has been made within the time prescribed and the decision appealed from would be upheld, although on different grounds.

By the Indian Acts (Application) Ordinance (Cap. 2) the Indian Limitation Act 1908, is applied to Tanganyika together with its amendments as in force on December 1, 1920. The relevant part of the First Schedule to the Act, as originally enacted, according to the official version of the Act as published by the Superintendent of Government Printing, India, reads as follows:

“Description of Application	Period of Limitation
175. For payment of the amount of a decree by instalments.	Six months
176. Under the same Code, to have the legal representative of a deceased plaintiff or of a deceased appellant made a party.	Ditto
177. Under the same Code, to have the legal representative of a deceased defendant or of a deceased respondent made a party.	Ditto

178. Under the same Code, for the filing in
court of an award . . .

Ditto”

In the Act as originally published in the *Gazette* of India, however, the period of limitation against art. 177 was stated to be “six months” instead of “ditto”. On September 2, 1920, by Act 26 of 1920, this part of the First Schedule was amended by substituting in arts. 176 and 178 for the word “ditto” in column two the words “ninety days” and “six months” respectively. No mention was made of art. 177. A wide divergence of opinion arose in the courts in India as to the effect of the amending Act of 1920 on art. 177. The courts of Bombay and Calcutta, basing their reasoning on the presence of the word “ditto” against art. 177 in the Government Printer’s version of the Act of 1908, held that the word must refer to the new period of ninety days prescribed by the 1920 Act in respect of art. 176, but the courts of Lahore, Allahabad and Madras, basing themselves on the *Gazette* of India version, which used the word “six months” instead of the word “ditto” against art. 177, held that the period remained at six months notwithstanding the amending Act of 1920. By s. 78 (2) of the Indian Evidence Act, the proceedings of the Legislatures of India can be proved by producing the relevant journals of those bodies, or by published Acts or abstracts, or by copies purporting to be printed by order of Government. The version of the Limitation Act published by the Superintendent of Government Printing and the version contained in the *Gazette* of India are both authoritative for the purpose of proving the contents of the Act. Where, as in this case, there is conflict between the two versions, which is to prevail? The later Indian cases dealing with this point, such as *Gobind Das v. Rup Kishore* (A.I.R. 1924, Lahore 65), consider that, having regard to rules made under the Indian Councils Act 1861, the text as published in the *Gazette* must be taken to be the authorized text of the Act in the case of a conflict between that text and the text as published in any other official publication. I am content to accept this proposition, which seems to me to be reasonable and to lay down a principle which leads to certainty where there might otherwise be ambiguity. I accordingly would hold that the words “six months” which occur opposite art. 177 in the authenticated text of the Limitation Act 1908, have not been altered by anything contained in the amending Act of 1920.

It follows that in my opinion the cross-appeal succeeds. The application, the subject of this appeal, was made within the period of six months’ limitation prescribed for such applications. I would therefore dismiss this appeal, allow the cross-appeal, and affirm the decision of the court below, although on different grounds. I would make no order as to the costs of this appeal, as the respondents have succeeded on a point not argued in the court below, nor put forward in any formal notice of cross-appeal, but raised before this court with leave at the last possible moment in the course of argument.

Sir Clement De Lestang V-P: I have had the advantage of reading in draft the judgment prepared by Law, J.A. with which I entirely agree. I will only add a few words of my own.

The principal question for decision in this appeal is what is the period of limitation prescribed by art. 177 of the Indian Limitation Act 1908 as amended by the Indian Limitation and Civil Procedure Code Amendment Act, 26 of 1920, this being the law of limitation applicable in Tanganyika and to this case. The latter Act did not specifically refer to art. 177 and whether or not it affected that article depends on whether the period of limitation prescribed by the principal Act was expressly stated or merely indicated by the word “ditto”. In the text of the principal Act as published by the Superintendent of Government Printing, India, the period of limitation for art. 175 is expressed to be six months and those for arts. 176, 177 and 178 by the word “ditto”. The amending Act replaced the first and third “ditto” by “ninety days” and “six months” respectively. In the text as published in the *Gazette* of India the words “six months” and not “ditto” appear opposite art. 177. The *Gazette* of India is not available here

but that this is the correct position appears from the judgment of the full court in *Gobind Das. v Rup Kishore* (A.I.R. 1924, Lahore 65). Although both versions of the Act are authoritative for the purpose of proving the contents of the Act I have no doubt that where there is a conflict between them the version published in the *Gazette* of India must take precedence. It was for this reason that the full court in the case cited held that the period of limitation for art. 177 remained unaltered by the amending act at six months. The decision of the full Court was followed in *Das v. Chand* (A.I.R. 1925, All. 77), *Khan v. Skinner* (A.I.R. 1925, All. 263), *Prasad v. Prasad* (A.I.R. 1927, Pat. 142), and *Mer v. Chettiar* (A.I.R. 1926, Mad. 65) in preference to those of *Din v. Keshavlal* (A.I.R. 1923, Bom. 299) and *Khemka v. Manmul* (A.I.R. 1924, Cal. 74) in which the court, acting on the version published by the Superintendent of Government Printing, took the contrary view.

It may well have been the intention of the legislature when enacting the amending Act of 1920 to reduce the period of limitation in respect of art. 177 to ninety days as in the case of the preceding article. The fact that the words “six months” were substituted for “ditto” in respect of art. 178 is a strong indication of such intention because if the period for art. 177 remained at six months the substitution was unnecessary and superfluous. In the event, however, it has failed to give effect to its intention as it has left unaltered the period of six months prescribed for art. 177 in the principal Act. In my judgment the period of limitation for art. 177 is six months and not ninety days and it follows that the application before the High Court was within time and that the learned judge was right to allow it although for different reasons. I agree with the order proposed by Law, J.A., and as Spry, J.A. also agrees it is ordered accordingly,

Spry JA: I also agree.

Appeal dismissed. Cross-appeal allowed.

For the appellant:

Taher Ali

Taher Ali & Co, Dar-es-Salaam

For the respondent:

Ranbir Singh

Awtar Singh & Co, Dar-es-Salaam

Lerunyani v Republic
[1968] 1 EA 107 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	9 December 1967
Case Number:	446/1967 (20/68)
Before:	Sir John Ainley CJ and Harris J
Sourced by:	LawAfrica

[1] Criminal Law – Stealing – Definition of stealing – “taking” or “conversion” essential ingredients – Penal Code, s. 268 (K.).

Editor’s Summary

At Baragoi trading centre, a passer-by saw the accused sitting outside a cattle boma. On enquiring about buying a cow in the boma, the accused told the passer-by that the cow was owned by him (the accused) and the accused agreed to sell it to the passer-by for Shs. 40/- and five goats. The passer-by gave the accused Shs. 40/-. The true owner of the cow then appeared and stopped the transaction from going further.

In the magistrate’s court at Maralal the accused was convicted of stealing the cow under s. 268 of the Penal Code (K.). He appealed.

Held –

- (i) there was no “taking” of the cow within s. 268 (1) and (5) Penal Code;
- (ii) there was no “conversion” of the cow within s. 268 (1) Penal Code; and therefore stealing was not proved.

Appeal allowed.

No cases referred to in judgment

Judgment

Sir John Ainley CJ: read the following judgment of the Court: In this case the appellant was convicted of the theft of a cow contrary to s. 278 of the Penal Code. The case has its absurd side. The evidence for the prosecution, and there is no reason to doubt that evidence, was as follows. Mperia brought his cow to Baragoi trading centre to sell, it and he did sell it to Napeikori for Shs. 100/-. Napeikori placed the beast in the cattle boma at the centre, and went to an hotel to take a cup of tea.

One Kale was passing the cattle boma during the absence of Napeikori, and saw the appellant sitting outside the boma. He thought that the appellant was the owner of the cow and offered to buy it. The appellant said that he was the owner of the cow and agreed to take Shs. 40/- and five goats for it. No sooner had the Shs. 40/- changed hands than Napeikori came back from his tea and there was a denouement. The appellant’s defence was that the cow was one he had lost six years earlier, or that he honestly believed it to be such, and seeing it in the boma he decided to sell it, without more ado, to a passer-by. The magistrate did not believe that story.

In view of what our decision must be we say no more about that story than this, that it certainly had its weaknesses. However it was rejected at the trial and the appellant was convicted of stealing the cow.

It is possible that the whole story was not related, but from what appears on the record there was not, we think, a theft of the cow.

It will be convenient to set out our definition of stealing, which is contained in s. 268 (1) of the Penal Code. That subsection reads:

“A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.”

To that definition we add the provisions of sub-s. (5) of s. 268:

“(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move.”

There was no evidence of any taking here, and the only question left for consideration is whether there was a conversion of the animal within the meaning of s. 268. We answer that question in the negative, because we do not think that there was a conversion of the animal at all. The obscure wording of sub-s. (3) of s. 268 may indicate that it is possible for a man fraudulently to convert property to the use of some person and thus to steal the property in spite of the fact that the property at the moment of conversion is not in his possession. But we may be forgiven for saying that there must yet be a conversion, and that word used in this context we think implies at least an act which results in a turning about, a change, in the control of a thing in the ownership of a thing or in the possession of a thing. We are not prepared to say with complete certainty what the position would have been if Kale had walked off with the cow. The fact is that he did not do so. There was no delivery of the cow, and absolutely nothing happened either in law or in fact, to the eye of a lawyer or to the eye of a layman, except the transfer of Shs. 40/- from Kale's pocket to that of the appellant. Emphatically Kale never got the use of the cow. If the appellant's story, to which we have referred, was untrue, then of course he was guilty of obtaining the Shs. 40/- by false pretences, but we are satisfied that he did not “convert” this cow. For these reasons, and not for the reasons advanced by the appellant, we allow this appeal, quash the conviction and set aside the sentence.

We leave it to the State to decide whether further proceedings should be taken, but we point out that this man has been in custody since March, and that if he was guilty of what may be described as a fair-ground trick it was a wholly unsuccessful trick, and caused no loss to anyone.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

AA Mulla (State Counsel, Kenya)

Attorney-General, Kenya

Koech v Republic
[1968] 1 EA 109 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	19 October 1967
Case Number:	178/1967 (22/68)
Before:	Sir John Ainley CJ and Farrell J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Possession of stolen property – Admission of all the facts in the charge not necessarily a plea of “guilty” – Penal Code, s. 323 (K.).

Editor’s Summary

The appellant was charged with having in his possession thirteen gramophone records which the police alleged that they reasonably suspected had been stolen. The appellant, on being asked to plead to these facts, said “It is true, I admit the charge as read out to me”. He was thereupon convicted and sentenced. He appealed against the conviction.

Held –

- (i) the charge under s. 323 of the Penal Code cannot set out all the facts which constitute the offence as an accused is not guilty until the court has rejected his explanation of possession;
- (ii) an accused who admits all the assertions of fact in regard to his possession must then be asked for a satisfactory explanation and on failing to give one, may be convicted;
- (iii) if an accused admits all the assertions of fact but proffers an explanation, the accused’s statement should be treated as a plea of “Not guilty” and the prosecution be required to lead all their evidence.

Appeal upheld. Conviction quashed and sentence set aside.

No cases referred to in judgment

Judgment

Sir John Ainley CJ: delivered the following judgment of the Court: This is yet another case in which the provisions of s. 323 of the Penal Code engage the attention of this court.

That section reads:

“Any person who has been detained as a result of the exercise of the powers conferred by s. 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give any account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.”

It will be seen that the misdemeanour created by the section lies not merely in the possession or conveying of goods which initially the police, and later no doubt the court, reasonably suspect to be stolen or unlawfully obtained. The offence is not committed until an accused “having been charged” with such possession or conveying fails to give an account to the satisfaction of the court of how he came by the suspected goods.

There is of course no method of charging a man with failure to do something which he has not at the time of the charge had the opportunity to do, and the prosecution have not been required by the legislature to make the attempt, or so we think. It is for the prosecution to “charge” the suspect with having in his possession or conveying something which is reasonably suspected to have been

stolen or unlawfully obtained, and it is then for the court if satisfied by the admissions of the accused or by evidence if no admissions are made, to call on the accused for his explanation.

There is really no difficulty about the matter at all so long as it is noted that s. 323 is an unusual section, calling for some deviation from the normal procedure. The “charge”, it is surely obvious from what we have said, cannot set out all the facts which constitute the offence. The charge in proceedings under this section simply lays the foundation for the procedure which must follow, and no true plea of guilty can be made thereto.

It is clear that the truth of all the assertions which can properly be stated in such a charge can be admitted by an accused without any admission of wrongdoing, and certainly the simple admission of the truth of those assertions cannot possibly amount to an admission of the misdemeanour created by the section.

Once this is grasped it becomes very clear that the proper procedure is for the court first to ascertain whether the accused admits the assertions set out in the charge. It will always be difficult no doubt to explain the assertion which deals with the “reasonable suspicion” of the police; but it will usually be unnecessary to spend very long over this matter, for if there is any doubt at all as to whether the accused really understands that assertion, and there very often will be doubt, it should be assumed that he does not subscribe to it.

If however the accused does admit all the assertions in the charge he should then be told that if he does not give an acceptable explanation of his possession he will be convicted and possibly punished. If the accused declines to give any explanation he may be convicted without more ado. If he says that he has an account of affairs which he wishes to give a rather difficult question arises. Is it proper to permit him there and then to give his account? We think that if the accused indicates that he intends to defend himself by giving an explanation of his possession the court should require the prosecution first to lead their evidence, for though the accused may admit the basic assertions in the charge, he may not admit in full the circumstances relied on by the prosecution, and these circumstances may materially affect the credibility of the accused’s explanation. It will be proper then to treat the accused’s statement that he wishes to advance an explanation as equivalent to a plea of “Not guilty” in a more usual case, a plea which puts all in issue.

If the accused indicates that he does not admit the assertions in the charge then of course the prosecution will lead their evidence and the accused will be called on for his defence.

In the present case the charge set out:

- (a) that the accused had been detained by a policeman;
- (b) that thirteen gramophone records had then been found in his possession; and
- (c) that the police reasonably suspected that the records had been stolen.

The appellant was asked to plead to this charge as he would have been asked to plead to a charge of theft, let us say. We trust that we have said enough to indicate that this was an error.

However the appellant said: “It is true. I admit the charge read out to me”. Now it is perfectly true that many men charged with the strange misdemeanour created by this remarkable section cannot be disabused of the notion that they are accused of theft, and the appellant may have intended to say that he stole the records, but of course we cannot rely upon any such supposition. We must assume that he intended to do no more than in fact he did. He admitted possession of the thirteen records and, we must

assume, though we do so with reluctance, that the police not only suspected that they were stolen but had reason to do so.

But having admitted so much the appellant had confessed to no offence at all, and it was quite wrong to convict him, as was done, and to sentence him. As we have indicated the appellant should have been asked if he wished to put forward an explanation of his possession. It is reasonably clear from the appellant's petition of appeal that he had an explanation for his possession which, though it may not be true, he should have been allowed to advance.

Clearly the conviction cannot stand. We quash it and set aside the sentence. We have considered whether we should order a re-trial. We think it proper not to do so. The appellant has been in custody for nearly two months, there may well be difficulties in finding proper bail, and on the whole we think that to continue the proceedings would be burdensome.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

AF Kisebu (State Counsel, Kenya)

Attorney-General, Kenya

Pazi v Mohamed
[1968] 1 EA 111 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	8 December 1967
Case Number:	97/1966 (34/68)
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] *Evidence – Marriage – Presumption of – Mohammedan Marriage – Cohabitation as husband and wife for several decades – Indian Evidence Act 1872, s. 50 (T.).*

[2] *Mohammedan Law – Marriage – Cohabitation as husband and wife for several decades – Presumption of marriage arising – Indian Evidence Act 1872, s. 50 (T.).*

Editor's Summary

The inheritance of a deceased's estate under the law of the Shafi sect of Islam depended on whether the deceased widow was lawfully married to the appellant. There was evidence that the parties had cohabited as husband and wife for several decades and the only points in issue were (i) whether such cohabitation raised a presumption as to the existence of a valid marriage and (ii) if so, whether any evidence had been led to rebut such a presumption.

Held –

- (i) section 50 of the Indian Evidence Act 1872 provides that evidence of continual cohabitation as husband and wife is admissible to raise the presumption of marriage in Islamic law;
- (ii) there was ample evidence of continual cohabitation and the onus was therefore on the respondent to rebut the presumption of marriage;
- (iii) there was no such evidence before the court.

Appeal allowed. Decision of the district court set aside and that of the primary court restored with costs in all three courts to the appellant.

No cases referred to in judgment**Judgment**

Hamlyn J: This appeal concerns a question of fact; whether the woman Fatuma d/o Ali or Ambari (now deceased) was

lawfully married to the appellant, Ali s/o Pazi. The claim, which arises out of the decision, is in respect of certain property left by the deceased woman and as to who should inherit it. There is no dispute that all the parties concerned in these proceedings are members of the Shafi sect of Islam, nor is the division of the property in issue. Once the decision as to whether there was a valid marriage between the appellant and the deceased woman has been reached, the question of inheritance presents no difficulty.

Counsel for the respondent laid stress upon the contention that the views of the Shafi sect are most conservative and that, this being so, the appellant must show that all the minutiae of Islamic law have been meticulously complied with in so far as the alleged marriage ceremony is concerned. He urged upon me that no presumption as to marriage arises in cases of this nature and that only upon strict proof of every legal requirement as to marriage can such marriage be held to have taken place. Thus, the appellant must show that a wali was present and that such guardian carried out his prescribed duties; he must show that the ceremony was performed by an authorized person and that the necessary two qualified witnesses were in attendance.

Now all this is undoubtedly correct save that neither counsel has referred this court to the underlying principle (which obtains in Islamic law as it does in many other codes) that there is a presumption of marriage where a man and woman have lived together as man and wife for a considerable period of time. I cannot accept the contention of counsel for the respondent that no such presumption arises in the law of Islam in general or in that of the Shafi sect in particular. To do so would be to lay upon the appellant a burden which he would almost certainly be unable to discharge after so considerable a period of time.

Nor can I agree that the absence of a certificate of marriage has any particular significance, other than (to some minor degree) supporting the respondent's case. The failure to produce such written evidence may be accounted for in many ways after a period of some forty years. There is no magic in such document, nor does its non-production necessarily raise a presumption that no marriage took place between the parties.

The district court, in its appellate jurisdiction, differed from the decision of the primary court of Ilala and held that there was no real proof of the marriage. But nowhere in its judgment did it refer to the question of onus of proof and the magistrate, in deciding the matter, appears to have acted on the assumption that it was for the appellant to prove his case. That is not so, for there is a presumption of law in his favour.

It appears that the Statement of Islamic Law, published as Government Notice No. 222 of 1967, has as yet not been brought into force and consequently this court is not able to adopt direct from it cl. 41 which governs presumptions in matters of this nature. But such Statement embodies the existing provisions of the law of Islam and is further supported by s. 50 of the Indian Evidence Act. Even prior to 1872 when that Act became law, evidence of continual cohabitation as husband and wife was admissible to raise a presumption of marriage in Islamic law and a number of Indian cases support this view. It is however necessary that such cohabitation as is shown be proved as that of husband and wife, for no other form of cohabitation suffices.

Both parties agree that there was cohabitation between the appellant and the woman lasting over several decades; the appellant himself in the primary court claims that she was his wife. There was independent evidence in that court showing that Ali Pazi and the woman lived together as husband and wife, and the woman Fatuma d/o Abdullah informed the court that, at the time that she (Fatuma) became friendly with the deceased woman, "she was married and told

me that her husband was Ali Pazi". She added "I know that Ali Pazi was the husband of the deceased Fatuma Ambari".

There is, I consider, ample evidence in the appellant's case to establish both the fact of cohabitation and that such cohabitation was patently that of man and wife, and, this being the case, the onus falls upon the respondent to show that there was in fact no subsisting marriage.

It is I think here (upon this question of presumption) that the district court has gone astray. Both in respect of the relationship of the wali and in the non-production of a certificate of registration of the marriage, the court has viewed the matter as one in which the onus lay upon the appellant. As a result of the man-and-wife cohabitation over so long a period, which was clearly established, it was upon the respondent to produce evidence to show that there was in fact no marriage between these persons.

There is evidence of the presence of an acceptable wali and of the required witnesses. There was also evidence (which was un-rebutted) that a kadhi named Hamisi Mamboya performed the marriage ceremony.

The respondent has failed to produce any evidence which satisfactorily sets aside the presumption of marriage between the appellant and the woman Fatuma, while there is considerable evidence supporting the presumption.

In the event, therefore, this appeal must be allowed and the decision of the district court is consequently set aside, that of the primary court being restored. The appellant will have the costs of this appeal and his costs in the courts below.

Appeal allowed.

For the appellant:

Awtar Singh

For the respondent:

SA Kitabwalla

Alidina v Globe Mercantile Corporation Ltd
[1968] 1 EA 114 (CAD)

Division: Court of Appeal at Dar-Es-Salaam
Date of judgment: 23 December 1967
Case Number: 43/1967 18/68
Before: Sir Clement de Lestang V-P, Spry and Law JJA
Sourced by: LawAfrica
Appeal from: High Court of Tanzania – Duff, J

[1] *Contract – Anticipatory breach – Refusal to accept delivery – Principles.*

[2] *Contract – Refusal to accept delivery – Whether seller must show that he was ready willing and able to perform – Law of Contract Ordinance, ss. 38 (2) (a) and 39 (T.).*

Editor's Summary

The appellant entered into a contract to sell to the respondent seventy-eighty tons of sisal, the sale to be completed by December 31, 1964. The appellant alleged that the respondent had accepted twenty-five tons for which part payment had been made, but had refused to accept the balance of the sisal. The appellant sued for the balance of the purchase price for the twenty-five tons delivered, for damages for loss of profit on the remainder of the sisal not delivered, and for interest and costs. The trial judge gave judgment for the appellant in respect of the balance of the purchase price for the twenty-five tons, damages, and for loss of profit in respect of four tons which he found that the appellant had ready for delivery but which the respondent indicated would be rejected. The judge held that as to the balance of the sisal (about forty-one tons) the appellant must prove that he was ready willing and able to perform the contract and that he had failed to prove this. This appeal was brought (i) against the finding in regard to the balance of the forty-one tons and (ii) on the ground that, as the judge had not rejected the appellant's evidence, his evidence was sufficient to prove willingness and ability to deliver the rest of the sisal. As to the forty-one tons, in respect of which damages were awarded to the appellant, the judge found that there was an anticipatory breach of contract. The respondent company had indicated to the appellant in September, 1964 that it would not accept delivery of the four tons which the appellant had ready. The appellant chose to approach the respondent company again at the beginning of December, 1964 and offered to deliver the sisal, which offer was again refused.

Held –

- (i) although the case was governed by the Law of Contract Ordinance, English authorities were of persuasive value in the interpretation of the Ordinance;
- (ii) the appellant, in order to succeed, must be able to show that he had made an effectual offer within the meaning of s. 38 of the Law of Contract Ordinance and, having regard to sub-s. (2) (a) he must have been both able and willing to perform the contract;
- (iii) the appellant had chosen to treat the contract as subsisting up to the last contractual date for delivery rather than to rely on the anticipatory breach;
- (iv) the appellant's evidence in regard to his being able and willing to perform the contract failed to prove his case.

Appeal dismissed with costs.

Cases referred to in judgment:

(1) *Cort v. Ambergate, etc., Ry. Co.* (1851), 17 Q.B. 127; 20 L.J.Q.B. 460.

(2) *British and Beningtons Ltd. v. North Western Cachar Tea Co. Ltd.*, [1923] A.C. 48.

December 23, 1967. The following considered judgments were read:

Judgment

Spry JA: The appellant entered into a contract with the respondent company for the sale of seventy – eighty tons of reject grade sisal, delivery to be completed by December 31, 1964. About twenty-five tons were delivered, and a part payment made. The appellant alleged that the respondent company had refused to accept the balance of the sisal and sued for the balance of the purchase price of the twenty-five tons, for damages for loss of profit in respect of about forty-five tons not delivered, interest and costs. The learned trial judge found for the appellant as regards the balance of the price for the twenty-five tons and he also awarded the appellant damages in respect of four tons which had been ready for delivery but which the respondent company had indicated would be rejected. As regards the remaining forty-one tons (referred to, presumably through a slip, as twenty-one tons), the judge held that it was for the appellant to prove that he was ready and able to perform the contract and that he had failed to do so, his evidence on this aspect of the case being “rather vague”.

The appellant appealed against this last part of the judgment, the basis of the appeal being that the judge, having held that the respondent company had indicated that it would not accept delivery of the balance of the sisal, erred in requiring proof that the appellant was ready and able to supply it. Counsel for the appellant, relying on various English authorities, submitted that where there is an anticipatory breach, the question of willingness and ability to supply goods does not arise. In the alternative, counsel for the appellant argued that, since the judge had not disbelieved the appellant, his evidence was sufficient to prove willingness and ability to deliver the rest of the sisal.

No notice of cross-appeal was filed. At the hearing of the appeal, counsel for the respondent company sought leave to argue that the judge had erred in awarding damages in respect of the four tons of sisal and in holding that the respondent company had ceased to be “interested in sisal”. We were not satisfied that there was any good reason for non-compliance with r. 65 of the Eastern African Court of Appeal Rules 1954; we considered that there had been ample time for the preparation of a notice of cross-appeal while application could, if necessary, have been made for an extension of time within which to file and serve such a notice. Furthermore, the matter was one of fact and not of law. We accordingly refused the application.

The learned judge distinguished between the four tons and the balance of the sisal. As regards the four tons, he made a clear finding of an anticipatory breach of contract. He said:

“I have no difficulty in accepting that four tons of sisal were ready and available but they were rejected by the defendant company, they having indicated to the plaintiff that they did not want the sisal.”

As regards the balance of the sisal, the judge held that the question was whether it had been proved that the appellant was disposed and able to complete the contract. The appellant had admitted that he had not produced this sisal from his own estate and was in some financial difficulty but had said that he realised he could get sisal from other estates and had arranged this. The judge thought this part of the evidence was “rather vague” and held that this part of the claim had not been proved.

I would begin by observing that this matter is governed not by English law but by the Law of Contract Ordinance (Cap. 433), of which no mention was made in the judgment or in argument before us, although since that Ordinance was derived from the Indian Contract Act 1872, which was itself based on

English law, English authorities have a persuasive value in the interpretation of the Ordinance.

I think, with respect, that counsel for the appellant's main argument was misconceived. If, as the judge found, the respondent company intimated to the appellant in September, 1964, that it was useless for him to deliver the four tons of sisal he then had ready as it would not be accepted, I think the appellant could have treated this as an anticipatory breach of the contract under s. 39 of the Law of Contract Ordinance, could have rescinded the contract forthwith and sued for damages. In that event, the appellant would have been under no obligation to show that he was ready and willing to perform, because the breach would have occurred at a time when he was not required under the contract to have the sisal ready for delivery. I am strengthened in that view of the Tanganyika law by the English cases of *Cort v. Ambergate, etc., Ry. Co.* ((1851,) 17 Q.B. 127) and *British and Beningtons Ltd. v. North Western Cachar Tea Co. Ltd.* ([1923] A.C. 48), cited by counsel for the appellant. But the appellant did not choose to rely on that anticipatory breach. He said in evidence that he approached the respondent company at the beginning of December and again at the end of the month, saying that he was in a position to deliver the sisal, but on each occasion was met with a refusal. Thus it is quite clear on his own evidence that he preferred to treat the contract as still subsisting, or, to use the words of s. 39, that he acquiesced in its continuance.

The position must then be looked at as it was on December 31, 1964, the date by which under the contract the sisal had to be delivered. For the appellant to claim a breach of contract on that date, he must, I think, be able to show that he made an effectual offer within the meaning of s. 38 of the Law of Contract Ordinance and that, having regard to the terms of sub-s. (2) (a), presupposes that he must have been both able and willing to perform the contract. No regard can be had to the anticipatory breach in September or the second anticipatory breach at the beginning of December, assuming there was one, because the appellant had himself chosen to treat the contract as subsisting up to the last contractual date for delivery. The appellant might have relied on the anticipatory breach or he might have made a valid tender of the sisal but he did neither. In my view, the judge was right in holding that if he made a mere offer of delivery at the end of the term of the contract, he had to show that he was in a position to effect delivery.

As regards the second ground of appeal, it is true that the judge appears to have accepted the appellant as a witness of truth and disbelieved the evidence for the respondent company. The appellant said that he had "made arrangements" to obtain the sisal and he was not cross-examined on this, but he gave no indication of the nature of those arrangements. It is very likely that in a falling market the appellant could have obtained what was a relatively small quantity of sisal. I do not think that the appellant was under any obligation to commit himself to the purchase of the sisal but, to be in a position where he could say that he was not in breach of the contract and that the respondent company was in breach, I think he should have obtained an option. Furthermore, the appellant gave no evidence as to the price he would have had to pay for the sisal and it was on the difference between this price and the contract price that the amount of damages would have had to be assessed. I have come to the conclusion, therefore, that this ground of appeal must also fail.

I am not without sympathy for the appellant but I think the judge was right when he held that the appellant had failed to prove his case. I would dismiss the appeal with costs.

Sir Clement De Lestang V-P: I agree and as Law, J.A., also agrees the appeal is dismissed with costs.

Law JA: I agree with the judgment prepared by Spry, J.A.

Appeal dismissed.

For the appellant:

JS Balsara

Sayani, Balsara and Velji, Dar-es-Salaam

For the respondent:

NP Patel

PR Dastur, Dar-es-Salaam

Nzarirehe v Kagubaire
[1968] 1 EA 117 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 12 March 1968

Case Number: 275/1966 (38/68)

Before: Goudie J

Sourced by: LawAfrica

[1] *Master and servant – Liability of master – Scope of employment – Unauthorised deviation by lorry driver to visit his home.*

[2] *Master and servant – Liability of master for the torts of his servant – Negligence of servant committed after departing from instructions.*

[3] *Negligence – Vicarious liability – Of employer for negligence of lorry driver – Collision occurred after driver had departed from instructed route – Whether still acting within the scope of his employment.*

Editor's Summary

The defendant was the employer of a lorry driver who was instructed on the day in question to collect lorry loads of sand and deliver them to the defendant's work-place. Following instructions, he had delivered one load of sand but on returning to collect a further load for delivery, he decided to go home to see his wife. On his way home, he was involved in a collision with the plaintiff who was riding a bicycle and as a result of the collision, the plaintiff suffered personal injuries and damage to his bicycle. The plaintiff sued the defendant as employer of the driver and in order to succeed, had to show (i) that the lorry driver was acting within the scope of his employment at the time when the alleged act was committed and (ii) that the lorry driver was negligent. The plaintiff claimed special damages in the sum

of Shs. 380/- and general damages for loss of earnings, pain and suffering and disability.

Held –

- (i) the defendant's driver was doing little more than interrupting an authorised journey undertaken in relation to his master's business;
- (ii) in assessing what is incidental to an authorised act of travel, regard must be had to the fact that what would have legitimately been regarded as an expedition by a carman in the nineteenth century might well be regarded as a mere deviation by a driver of a fast lorry in the twentieth century;
- (iii) the lorry driver was acting within the scope of his employment with the defendant;
- (iv) the defendant's lorry ran into the plaintiff's bicycle through the negligence of the lorry driver, for which the defendant was vicariously liable.

Judgment for plaintiff for Shs. 18,380/- with interest and costs.

Cases referred to in judgment:

- (1) *Canadian Pacific Railway Company v. Lockhart*, [1942] 2 All E.R. 464.
- (2) *Beard v. London General Omnibus Co.*, [1900] 2 Q.B. 530.

- (3) *Ricketts v. Tilling (Thos.) Ltd.*, [1915] 1 K.B. 644.
- (4) *Storey v. Ashton* (1869), L.R. 4 Q.B. 476.
- (5) *Joel v. Morison* (1834), 6 C. & P. 501; 172 E.R. 1338.
- (6) *Higbid v. R. C. Hammett Ltd.* (1932), 49 T.L.R. 104.
- (7) *Hilton v. Thomas Burton*, [1961] 1 All E.R. 74.
- (8) *Kay v. I.T.W. Ltd.*, [1967] 3 All E.R. 22.
- (9) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330.
- (10) *Milenger Frank v. Masaka Ginners Ltd.*, Civil Suit 341/63 (unreported).
- (11) *Joseph Kayanja and Ebukana Butagazibwa v. G. G. Alexander Hodges and James Bikaju*, Civil Suit 873/64 (unreported).
- (12) *John Edgar Ritchie and Eidda Jean Ritchie v. Kigezi Plantation Co. Ltd. and Eria Tibamwenda*, Civil Suit 178/67 (unreported).

Judgment

Goudie J: The plaintiff is suing for damages for personal injuries caused by the negligent driving of a motor vehicle driven by the defendant's servant.

The defendant admits that the vehicle was driven by his servant but denies that the servant was acting within the scope of his employment and also denies negligence.

On the day in question the defendant's servant was engaged in collecting lorry loads of sand which he was required to deliver to the defendant's work-place. It would appear that after the lorry had completed one trip the driver set out to collect a further load which he intended to deliver in accordance with the defendant's orders. On the way however, he decided to go to his home to see his wife. Whilst on his way to his home he was in collision with the plaintiff who was riding a bicycle. The plaintiff's bicycle was damaged and the plaintiff injured.

The first issue is whether the defendant's servant was acting within the scope of his employment or whether he was on what used to be called "a frolic of his own".

Accepting from the evidence the circumstances most favourable to the defendant, and accepting the defendant's own evidence and that of his witness, the turnboy, the driver was at the most four miles off his normal route, the detour or deviation or whatever one wishes to call it was at the most a temporary interruption in the performance of the driver's instructions, and the driver did complete his second trip after the accident. I also accept that the driver had regularly been allowed before this day to drive his lorry home to lunch and had been in the habit, whether known to the defendant or not, of calling in at his home when working in the vicinity.

The duties and hours of work of the driver were not very clearly defined and he seems to have enjoyed a certain amount of latitude in regard to the detailed manner in which he performed his duties, provided that he carried out his master's general instructions. It seems that the driver was the only servant employed in the master's business and that there was, as the plaintiff's advocate submitted, a sort

of loose two man relationship not uncommon in small businesses in this territory.

The law relating to the question of what does or does not amount to acting within the scope of a servant's employment in circumstances such as these is stated in Salmond on Torts (9th Edn.), p. 95, as follows:

“It is clear that the master is responsible for acts actually authorised by him; for liability would exist in this case even if the relation between the parties was merely one of agency and not one of service at all. But a master

is liable even for acts which he has not authorised, provided they are so connected with acts that he has authorised that they might rightly be regarded as modes – although improper modes – of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it . . . On the other hand, if the unauthorised or wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible; for in such a case the servant is not acting in the course of his employment but has gone outside of it.”

This statement of the law received the specific approval of the Privy Council in *Canadian Pacific Railway Company v. Lockhart* ([1942] 2 All E.R. at p. 467). In that case it was held that a master was liable for injuries to a child negligently caused by his servant driving his own uninsured car from West Toronto to North Toronto to deliver a key in the course of his duties. The extent to which the principle was carried in that case may be seen from the fact that the company’s employees had twice been issued with notices prohibiting servants from using their own cars for company purposes unless insured “against public liability and property damage risks”. Moreover, at the time the servant elected improperly to use his own car, there were three company vehicles available for his use had he wished to use them.

The law however, is perhaps not quite so weighted against the employer as the above cited case would seem to suggest and it is probably a question of degree on the facts of each particular case whether the servant was performing an authorised act in an unauthorised manner or whether he was embarking on an independent act of his own.

I have carefully studied the cases cited to me, some of which fall on one side of the line and some the other. Although at first sight they may appear some-what inconsistent it seems to me that they all in fact support Salmond’s above quoted principles which have the force of the approval of one of the strongest possible Privy Council Courts.

In *Beard v. London General Omnibus Co.* ([1900] 2 Q.B. 530) the bus company was held not liable for injury caused when the conductor of a bus drove it in the absence of the driver and without the driver’s authority. It was held that “the plaintiff had not discharged himself from the burden cast upon him of showing that the injury was due to the negligence of a servant of defendants acting within the scope of his employment”. The plaintiff had led no evidence in this case that the conductor had any authority whatsoever to drive the omnibus and clearly the act itself was *prima facie* unauthorised and wrongful and it was not only a wrongful mode of execution. In contrast, in *Ricketts v. Tilling* ([1915] 1 K.B. 644) where the driver was present sitting alongside the conductor it was held that there was evidence of negligence by the driver in permitting the conductor to drive at all. A re-trial was ordered but there appears no record of the ultimate decision on the question of liability.

In another leading case, *Storey v. Ashton* ((1869), L.R. 4 Q.B. 476) a carman returning to his employer’s premises after business hours was persuaded by an accompanying clerk to drive off in a different direction on the clerk’s business. The employer was held not liable as the carman “was not doing the act, in the doing of which he had been guilty of negligence, in the course of his employment as servant”. This decision was peculiar to the facts of the particular case and perhaps more can be gleaned from the ratio decidendi and obiter dicta of the members of the court than from the particular decision itself. Cockburn, C.J., said (*ibid.* at p. 479):

“I am very far from saying, if the servant when going on his master’s business took a somewhat longer route, that owing to the deviation he would

cease to be in the employment of his master so as to divest the latter of all liability. In such cases it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment.”

Applying this reasoning to the facts of the case under trial I would remark that the defendant’s driver was perhaps doing little more than interrupting an authorised journey, undertaken in relation to his master’s business, by an unauthorised deviation for his own pleasure at the end of which, albeit after the accident, he completed the business of his master. I think also in assessing what is incidental to an authorised act of travel one ought to take into account that what might legitimately be regarded as almost an expedition by a “carman” in the nineteenth century might well be a mere deviation by the driver of a fast lorry in the twentieth century.

Reverting to *Storey v. Ashton* (*supra*), the following words are also I think of importance in considering the ratio decidendi: “every step he drove was away from his duty” (per Mellor, J., at p. 480) and “if he had merely been going a roundabout way home the master would have been liable” (per Lush, J., at p. 480).

Even before *Storey v. Ashton* it was held in *Joel v. Morison* ((1834), 6 C. & P. 501) that:

“If a servant driving his master’s cart on his master’s business makes a detour from the direct route for some purpose of his own his master will be answerable in damages for any injury occasioned by his careless driving whilst so out of his road.”

It might be argued that the principle in this decision is too broadly stated but it should be borne in mind that it is a requirement for liability that the servant must still be “on his master’s business”, at least in a broad sense, and the use of the word “detour” probably implies an intention to return later to his legitimate duty.

Coming to more modern times we find such cases as *Higbid v. R. C. Hammett Ltd.* ((1932), 49 T.L.R. 104 (C.A.)) and *Hilton v. Thomas Burton* ([1961] 1 All E.R. 74).

In the former case the master was held not liable when the servant was involved in an accident when riding his master’s cycle home to his dinner with the consent of his master. It is important, however, to note that the reason for that decision was that under the Shop Acts the master had no power to say how the servant was to use his dinner hour and therefore had no right of control over his movements.

In the latter case the master was held not liable when the servant went off for refreshments, which the master permitted, during working hours. He was held not liable as the servant “was not doing something that he was employed to do”. I think the key to this decision, however, is to be found in the fact that the trial judge, Diplock, J., was convinced that the servant and his companions “had decided they had done enough work to pass muster and were filling in the rest of their time until their hours of work had come to an end”. In the instant case no such conditions applied and in fact the servant completed the trip after the accident.

On the principles enunciated in the above cited cases, as applied to the facts in the instant case, I find that the servant was acting within the scope of his employment.

I am strongly fortified in this view by the recent case of *Kay v. I.T.W. Ltd.* ([1967] 3 All E.R. 22). Without going into the facts, a reference to this case will show the extent to which the court went to hold that a servant was acting within the scope of his employment even though he was doing something which was very clearly outside the duties for which he was employed. The court held that “his misconduct was not so gross and extreme as to take his act outside the scope of his employment”. Danckwerts, L.J., after some amusing observations on the hazards of life of an employer of labour, expressed the view that his vicarious liability came near to that in the celebrated case of *Rylands v. Fletcher* ((1868), L.R. 3 H.L. 330).

Finally, on this issue I may say that had the onus of proof rested on the defendant and not on the plaintiff I would have had serious doubts about accepting the turnboy’s evidence which was the only evidence to show that the driver was in fact on his way home and not about his master’s business. However, the accident did occur within a few hundred yards of the driver’s home and it was not suggested that he was on an authorised or accepted route. In these circumstances I did not consider it proper to discount entirely the turnboy’s evidence on this particular issue.

I have dealt with this issue at length as I have been unable to find previous Ugandan authorities on this particular point and it may be convenient to have an authority on the law applicable in Uganda. It will be seen that I have followed the English and Privy Council decisions as it seems to me that they are as applicable to Uganda as to England and Canada.

On the issue of negligence I can, fortunately, be quite brief. I have no hesitation in accepting the plaintiff’s version that the defendant’s lorry ran into his cycle through negligence on the part of the lorry driver. I do not believe the defendant’s version that the cycle ran into the back of the lorry. The defendant did not impress me as a truthful witness and his attitude towards the ownership of the vehicle and his failure to reply to the original claim did not suggest any degree of integrity on his part. His very belated suggestion that the driver was acting without his authority also suggested that he was clutching at straws to evade liability at all costs. I did not believe that his turnboy saw the driver give any light or hand signals or that he heard the horn sounded. It would be most improbable in any circumstances for a turnboy in the back of a lorry, not knowing of the possibility of an imminent accident, to note all these details and due to the construction of the lorry I am sure he saw nothing at all because it would be physically impossible for him to have done so. The worth of his evidence may be gauged from his demonstration of the driver holding out his hand to give a right hand signal “showing he was going left”.

The petrol point attendant I was convinced was a witness making a very poor attempt to describe as an eye witness an accident he did not see at all. I do not believe that he was, as he says, twenty yards from the scene, “saw the man run over and heard the crack of a broken leg” but “did not go to the place as I was on duty”. His duty consisted, according to him, of sweeping out the yard. This is only slightly less credible than his evidence that his petrol station was on the right, that the lorry was signalling to turn left at the road junction beyond the petrol station, and that it was going so slowly that he thought it was going to turn right into his petrol station yard.

There remains only the issue of damages. I accept the special damages as claimed and award a total of Shs. 380/-.

The general damages are to be assessed on the basis of loss of earnings (if any), pain and suffering and disability. The plaintiff suffered a fracture of the tibia and fibula in the right leg. He is aged forty-nine years. He spent about two weeks in hospital and was an outpatient for about two months. I

think it

reasonable to accept that he was totally incapacitated so far as work was concerned for about four months or slightly less and that he experienced some pain in that period. There is a residual disability inasmuch as his right leg is partially deformed and one inch shorter than the left which, of course, results in a limp and difficulty in walking or cycling long distances or doing heavy work, or standing for long periods. Osteo-arthritis is “a very minor possibility in the future”.

At the time of the injury the plaintiff was a preacher earning Shs. 100/- per month and hoping for some advancement. I think his hope of earning Shs. 300/- per month may be too optimistic and I am reasonably sure he was not on the way to “becoming a bishop” as he appeared to think. His loss of earnings at the time of the accident could not exceed Shs. 500/- and his loss of future earnings would I think be generously compensated at Shs. 1,000/- per annum for ten years.

I have referred to the following High Court Judgments in assessment of damages for this particular disability: *Milenger Frank v. Masaka Ginnners Ltd.* (10); *Joseph Kayanza and Ebukana Butagazibwa v. G. G. Alexander Hodges and James Bikaju* (11); and *John Edgar Ritchie and Eidda Jean Ritchie v. Kigezi Plantation Co. Ltd. and Eria Tibamwenda* (12).

They do not provide particularly good comparisons because generally the injuries were more severe, the loss of earning capacity greater, and the ages not comparable. However, taking all these factors into account I award total general damages (including loss of earnings as above – Shs. 10,500/-) at Shs. 18,000/-.

There will therefore be judgment for the plaintiff for Shs. 18,380/- with interest at court rates from date of filing of suit until payment in full and costs.

Judgment for the plaintiff.

For the plaintiff:

SH Dalal

Dalal & Singh, Kampala

For the defendant:

P Musala

Musala & Co, Kampala

Selle and another v Associated Motor Boat Company Ltd and others [1968] 1 EA 123 (CAZ)

Division:	Court of Appeal at Zanzibar
Date of judgment:	31 August 1967
Case Number:	31/1967 (40/68)
Before:	Sir Clement de Lestang V-P, Duffus and Law JJA
Sourced by:	LawAfrica

Appeal from: High Court of Zanzibar – Saidi, Ag CJ

[1] Agency – Liability of principal for torts of agent – Operation of boats delegated by company to boatman – Service operated for the benefit of the company – Boatman negligent in the execution of his duties.

[2] Appeal – To Court of Appeal – Whether by way of re-trial Court of Appeal may reconsider evidence – Not bound to follow trial judge’s finding of fact.

[3] Master and servant – Liability of master – Distinguished from liability of principal for acts of agent.

[4] Negligence – Agent – Liability of principal for torts committed in course of execution of duties – Operation of boats delegated by company to boatman – Service operated for the benefit of the company – Boatman negligent.

[5] Practice – Hearing – Desirability of deciding all issues at first instance.

Editor’s Summary

The respondents owned and maintained a small fleet of boats for the purpose of carrying passengers from liners anchored off shore to and from the quay. The appellants were passengers conveyed in one of the respondents’ boats and while disembarking from the motor boat on to the landing stage, the second appellant fell on the quay and sustained severe injuries necessitating the abandonment by both appellants of the liner cruise in which they were participating. The actual running of the boats was entrusted by the respondents to a number of boatmen who managed themselves by means of a management committee of five men whom they themselves appointed. The respondents were the holders of the licences for the boats issued under the Port Rules of Zanzibar, and they received sixty per cent. of the gross takings from the hirings, out of which they paid for the licences and the upkeep and running expenses of the boats. The remaining forty per cent. was shared by the management committee and the crews. The appellants alleged that the second appellant’s injuries were caused when she was pulled out of the boat by one of the boatmen. This appeal was against findings by the trial judge (i) that the boatman was neither a servant nor agent of the respondents, but an independent contractor for whose tort they were not answerable and (ii) that the respondents, as common carriers, were not in breach of their contractual duty to carry their passengers without negligence. There was a cross-appeal by the respondents against the finding of fact by the trial judge who accepted the appellants’ version of the facts in regard to the cause of the second appellant’s injuries.

Held –

- (i) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally;
- (ii) there was no valid reason for interfering with the learned judge’s finding on the facts;
- (iii) where a person delegates a task or duty to another, not a servant, to do something for his benefit, or for the joint benefit of himself and the other,

whether that other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act;

- (iv) the boatmen were the agents of the respondents and the service was operated for their joint benefit;
- (v) the appellant's injuries were caused by the negligence of a boatman and therefore the respondents were liable.

(Per De Lestang, V.-P., obiter), a person employing another is not liable for that other's collateral negligence unless the relation of master and servant existed between them at the material time; the existence of the right of control is usually a decisive factor in deciding whether the relationship of master and servant exists.

(Per De Lestang, V.-P., obiter), it is always advisable for a judge of first instance to decide all the issues raised in the case before him so that further expense to the parties and further delay caused by sending the case back, as in this case, for an assessment of damages.

Appeal allowed. Case remitted to High Court for an assessment of damages. Cross-appeal dismissed and costs of appeal and cross-appeal to the appellants.

Cases referred to in judgment:

- (1) *Abdul Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270.
- (2) *Quarman v. Burnett* (1840), 6 M. & W. 499; 151 E.R. 509.
- (3) *Dalton v. Angus* (1881), 6 A.C. 740.
- (4) *Hewitt v. Bonvin and Another*, [1940] 1 K.B. 188.
- (5) *Ormrod v. Crosville Motor Services Ltd.*, [1953] 2 All E.R. 753.
- (6) *Norton v. Canadian Pacific Steamships Ltd.*, [1961] 2 All E.R. 785.
- (7) *Samson v. Aitchison*, [1912] A.C. 844.
- (8) *Trust Co. Ltd. v. de Silva*, [1956] 1 W.L.R. 376.
- (9) *Parker v. Miller* (1926), 42 T.L.R. 408.
- (10) *Price v. Kelsall*, [1957] E.A. 753.
- (11) *Benmax v. Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326.
- (12) *Smith v. Moss*, [1940] 1 All E.R. 469.

August 31, 1967. The following considered judgments were read:

Judgment

Sir Clement De Lestang V-P: The appellants are husband and wife. In August, 1963 they left Mombasa by liner on a cruise to South Africa. The liner called at Zanzibar. At Zanzibar ships do not go alongside the quay but anchor offshore and passengers desiring to go ashore are carried there for reward in motor boats, known as "shore boats", specially licensed for the purpose under the Ports Rules made under the

Ports Decree. The appellants were thus conveyed ashore in a motor boat owned by the respondents. While disembarking from the motor boat onto the landing stage the wife fell on the quay and sustained severe injuries necessitating hospitalization and the abandonment of the cruise by both appellants. It is convenient at this stage to refer briefly to the rules relating to shore boats and to explain how the boat in question was operated. The relevant rules are Rules 108 – 119. Very briefly they provide for the inspection and licensing of shore boats and the registration of their crews so as to ensure the comfort and safety of passengers using them. To that end certain duties are imposed on the licence holder such as to maintain his boat properly, not to permit it to be used unless sufficiently manned and unless the person in charge is competent and not to employ unregistered boatmen. In the event of the ownership of the boat being transferred r. 113 provides for the

licence to be transferred as well to the new owner. I cannot see anything in the rules to support counsel for the respondent's contention that a licensed shore boat can be hired out for use on the owner's licence. Having regard in particular to r. 113 I do not think that this contention is correct but nothing necessarily turns on it in this case.

It is remarkable that no reference was made at the trial to the rules as they are not without relevance to the decision of the main issue in the case which was whether the operators of the boats were the servants or agents of the owners/licence holders. Even if the owners did not control the day-to-day running of the boats the rules appear not only to confer upon them the right of control but also to impose the duty to do so. The existence of a right of control is usually a decisive factor in deciding whether the relationship of master and servant exists.

Be that as it may at the material time the respondents owned ten shore boats including the boat in question which was boat No. 5. They took out and paid for the licences to operate them and were thus the licence holders. They did not themselves, however, operate them. The boats were placed in the hands of boatmen who apparently then managed themselves by means of a managing committee of five men. There is no evidence as to how that committee was appointed. It was not appointed by the respondents. The crews of each boat were controlled by the committee whose orders they had to obey and by whom only they could be dismissed. Neither the crews nor the committee received any wages as such. The respondents received sixty per cent. of the gross takings, out of which they paid for the licences and the upkeep and running expenses of the boats. The remaining forty per cent. was shared by the committee and the crews.

It was in these circumstances that the appellants brought a suit for damages against the respondents on the ground that the wife's fall was caused by the negligence of the respondents' servant or agent. They alleged in para. 6 of their plaint that as the wife was disembarking from the motor boat one of the boatmen working in it "suddenly seized her arm and so negligently and forcibly pulled her forward as to cause her to fall violently to the ground".

The respondents denied liability on the grounds; (a) that the boatman was not their servant or agent; and (b) that even if he were he did not act as alleged and was not negligent. They alleged that the wife slipped and fell because she failed to take reasonable care, the landing stage being slippery on that day.

The following issues were by consent framed:

- “1. Was the first defendant's firm carrying on the business of common carriers at the material time?
2. Was the motor boat in question operated by the defendants' servants or agents?
3. (a) Was the defendants' servant or agent negligent as alleged in para. 6 of the plaint?
(b) If so, was he acting within the scope of his employment or authority, respectively?
4. Did the second plaintiff fail to take ordinary and necessary care in disembarking?
5. Did the plaintiff suffer any, and if so, what injuries and damages by reason of the alleged negligence of the defendants' servant or agent?”

The learned judge answered the issues thus:

“Although the defendants would appear to have been carrying on the business of common carriers of both goods and passengers at the material

time, their motor boats were operated and managed by agents who worked entirely outside their control. These agents were not, in fact, servants or agents serving in the capacity of servants. The answer to issue (1) would appear to be in the affirmative. As to issue (2), the answer is that motor boat No. 5 was at the material time being operated and managed by independent contractors over whom the defendants had no right of control and for whose tort the defendants were not answerable. On issue (3) (a), I find that a member of the crew in motor boat No. 5 was negligent as alleged in para. 6 of the plaint. I would only add that this boatman was not at the material time acting as a servant of the defendants but as one of the independent contractors who operated the boat. I need not answer issue (3) (b) due to my finding on issue (2) and (3) (a). Since the boatman responsible for the injuries on the second plaintiff was not at the material time a servant of the defendants or an agent acting for them in the capacity of a servant, then the defendants could not be held responsible for his act. On issue (4), my answer is in the negative. The last issue deals with both the injuries and the damages allegedly suffered by the second plaintiff. Due to my finding that the defendants are not answerable for the act of the boatman responsible for the injuries on the second plaintiff, I do not think that I have to deal with the question of damages. There is no doubt that the second plaintiff suffered the injuries alleged as a result of the act of one of the boatmen. But as the evidence shows that this boatman was not, truly speaking, a servant of the defendants or an agent acting for the defendant in the capacity of a servant, she cannot, unfortunately, recover damages for these injuries.”

The appellants appealed on two grounds, namely, that the learned judge:

- (a) erred in holding that the boatman was neither a servant or an agent of the respondents but an independent contractor for whose tort they were not answerable; and
- (b) in failing to hold that the respondents, as common carriers, were under a contractual duty at the material time to carry the appellants as passengers to their destination without negligence, and that they were in breach of their said duty.

The respondents cross-appealed for the purpose of supporting the decision on the ground that the appellants’ version of the incident that the second appellant was pulled out of the boat by a boatman was improbable and ought not to have been accepted by the learned trial judge.

I shall deal with the cross-appeal first as in my view it can be disposed of quite shortly. I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Sa.f v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270). It was contended for the respondents that the trial judge’s finding under attack was contrary to the probabilities, vitiated by a wrong approach and by a failure to scrutinize and evaluate the evidence correctly and influenced by an inspection of the scene of

which no notes were made and from which he drew conclusions unfavourable to the respondents. I do not think that the criticisms of the learned judge's judgment are fully justified. He was faced with two contradictory versions of the incident. He set out the evidence in support of both versions as well as the arguments of learned advocates. Appreciating fully that it was a matter of credibility and that it was necessary to consider the evidence with care, he did so and concluded:

"On the balance of probabilities, the plaintiffs' version of the manner in which the second plaintiff received the injuries alleged in para. 6 of the plaint seems to me to be more consistent and believable. The defendants' case was that the second plaintiff slipped and fell down having failed to take reasonable and necessary care when she was disembarking. The two boatmen, Mtondoo Hamisi and Awesu Ali, who were nearest the second plaintiff and were looking at her when she was leaving the motor boat denied having seen her fall at the time of disembarking. They had more opportunity than Bushiri Waziri and Hussein Juma, the other defence witnesses, who were up at the railings, of seeing what had taken place. Mtondoo in cross-examination agreed that he heard that a lady passenger had fallen down when he came on the second trip. The second plaintiff fell about two or three steps from the motor boat and it is obvious and, bearing in mind what I noticed when I visited the scene during this trial, that the boatmen could not have avoided seeing what had happened. I am therefore satisfied from the evidence before me that the second plaintiff was pulled out of the motor boat by one of the boatmen. The plaintiffs were unable to identify the actual boatman who had pulled out the second plaintiff. It does not appear to me that the failure of identification on the part of the plaintiffs could materially affect the issue of liability on the part of the defendants."

There was abundant evidence to support the learned judge's finding. Moreover it is quite clear that while he believed the appellant's evidence he disbelieved that of the boatman and the reason for his disbelief appears to me to be quite sound. I do not agree that his finding is contrary to the probabilities. A fall may be caused by a number of things and not necessarily by slipping on a wet surface. The respondents' case was that the boatman never touched the second appellant and did not even know of the fall until later. This is highly improbable, as the learned judge pointed out. It is also improbable that persons in the position of the appellants would have invented this story, sought to put the blame for the accident on an innocent person and perjure themselves in the process. As for the inspection it is indeed regrettable that no note was made of it and read to the parties at the time. Nevertheless it did nothing more than assist the learned judge to appreciate and evaluate the evidence. It did not materially affect his decision. I can see no valid reason for interfering with the learned judge's finding and the cross-appeal fails.

As regards the appeal itself it will be recalled that the learned judge held that the boatman was not a servant of the respondents but an agent in the nature of an independent contractor for whose negligence the respondents were not answerable. At the hearing of the appeal counsel for the appellant, a little generously I thought, conceded the first part of the finding and the question for decision is simply whether the second finding is right. Relying on a footnote in *Salmond on Torts* (13th Edn.), p. 112, where it is stated: "... so far as the law on tort is concerned there is no difference between the position of a servant and an agent in its narrower sense and the distinction is unimportant. All agents are either servants or independent contractors", counsel for the

respondent contended that since it is conceded that the boatman was not a servant of the respondents they are not responsible for his wrongful acts.

The footnote in *Salmond* is probably correct as far as it goes but it is, in my view, an over-simplification of the position. It is to some extent qualified in the text at p. 113 where the responsibility of an employer for the tort of an agent, who is not a servant, is impliedly recognized. Indeed the law reports abound with cases where a principal has been held liable for loss or injury caused by the wrongful acts of his agent although he was not a servant. In *Boustead on Agency* (12th Edn.), art. 99, it is stated that the principal will be liable for the wrongful act of his agent if it is one of a class of acts within the actual or apparent authority of the agent or if such wrongful act amounts to a breach by the principal of a duty personal to himself, liability for non-performance or non-observance of which cannot be avoided by delegation to another.

As I understand the law the fundamental and well settled rule is that a person employing another is not liable for his collateral negligence unless the relation of master and servant existed between them at the material time (*Quarman v. Burnett* (1840), 6 M. & W. 499; *Dalton v. Angus* (1881), 6 A.C. 740 at p. 829). It follows from this rule that the relationship of principal and agent will not in itself suffice to render the principal liable for the collateral negligence of the agent unless the agent is also a servant. Where however, a person delegates a task or duty to another, not a servant, or employs another, not a servant, to do something for his benefit or the joint benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be (*Hewitt v. Bonvin and Another*, [1940] 1 K.B. 188; *Ormrod v. Crosville Motor Services Ltd.*, [1953] 2 All E.R. 753 as explained in *Norton v. Canadian Pacific Steamships Ltd.*, [1961] 2 All E.R. 785).

Such liability is an application of the maxim *qui facit per alium facit per se* and the law appears to be now settled in England, at least in regard to the use of vehicles, that the liability of a principal for the wrongful acts of his agent exists in the same kind of circumstances as that of a master for those of his servants if “scope of authority” is substituted for “course of employment”. Thus an owner of a vehicle has been held liable if while in his car he allows someone else to drive it (*Samson v. Aitchison*, [1912] A.C. 844; *Trust Co. Ltd. v. de Silva*, [1956] 1 W.L.R. 376); if he is not in his car but has delegated to another, not his servant, the task of looking after it (*Parker v. Miller* (1926), 42 T.L.R. 408); if he is not in his car but it is being used wholly or partly on his business or for his purpose (*Ormrod v. Crosville Motor Services Ltd.*, *supra*).

If I am right in the view I take of the law then what has to be decided in the present case is simply whether the respondents delegated the task or duty of operating the shore boats to the boatmen or whether they employed the boatmen to operate the boats for their benefit or the joint benefit of themselves and the boatmen and in either case whether the negligent act of the boatman in question was committed in the operation of the boat.

On the facts which the learned judge found proved which briefly recapitulated are that the respondents were carrying on the business of common carriers, that they owned ten boats licensed for the purpose of their business and for which they paid the licences, that they handed over those boats to the boatmen to operate the service, that the boatmen were their agents though not their servants, that the service was operated for their benefit as well as for that of the boatmen and that the second appellant’s injuries were caused by the negligence of a boatman in pulling her out of the boat violently, the respondents are clearly liable on the principles which I have enunciated. The appeal accordingly succeeds

on this ground and it is unnecessary to consider the other ground of appeal. It is however unfortunate that the learned judge did not assess the damages as the

case will now have to go back for that to be done. It is always advisable for a judge of first instance to decide all the issues raised in the case before him so that further expense to the parties and further delay may be avoided in the event of the Court of Appeal having to adopt the course which we must adopt in the present case. Had this been done it would not have been necessary to send the case back to the High Court for the damages to be assessed thus increasing the large costs which the parties have already incurred.

I would accordingly allow the appeal and set aside the decision of the court below. I would remit the case to the High Court of Zanzibar to assess the damages, enter judgment for the appellants for the amount or amounts found due and make an appropriate order as to the costs of the whole trial in the High Court. I would dismiss the cross-appeal and award the costs of both the appeal and cross-appeal to the appellants with a certificate for two counsel. In an endeavour to save the parties further expense I would suspend the order remitting the case for one month so as to give them the opportunity of amicably agreeing on the quantum of damages should they be so advised. As Duffus and Law, JJ.A., also agree it is ordered accordingly.

Law JA: The facts have been fully set out in the judgment of the learned Vice-President and need not be repeated. I will deal first with the cross-appeal. Counsel for the respondents submitted that the learned trial judge's finding that one of the boatmen was negligent was arrived at without a proper evaluation of the evidence, and in particular without regard for the testimony of a customs officer, Mr. Hussein Juma, who was an independent witness, and who deposed that Mrs. Selle (the second appellant) slipped and fell on the slippery landing stage without any intervention on the part of a boatman. Nowhere in his judgment did the judge comment unfavourably on Mr. Juma's evidence. Counsel for the respondents submitted that as Mr. Juma's credibility and reliability were not in question, the judge had clearly wrongly evaluated the evidence as a whole in coming to his finding that one of the boatmen had been guilty of negligence, and he invited this court to make its own evaluation of the evidence and to draw the inference that Mrs. Selle's fall was not due to any negligence on the part of a boatman. Where it is apparent that evidence has not been properly evaluated by the trial judge, or that wrong inferences have been drawn from the evidence, it is the duty of an appellate court to evaluate the evidence itself and draw its own conclusions (*Price v. Kelsall*, [1957] E.A. 752; *Benmax v. Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326). In his judgment in the instant case, the trial judge set out the evidence for both sides at length, and specifically referred to that of Mr. Juma. It is true that the judge did not in terms reject Mr. Juma's evidence, or comment unfavourably on its credibility or reliability, but his conclusion was that, on a balance of probabilities, the version put forward by the appellants was "more consistent and believable" than the respondents' version. In particular, he did not believe the two boatmen who deposed that they did not see Mrs. Selle fall down, and he commented on the fact that Mr. Juma did not have as good an opportunity, from where he was standing, of seeing what happened as other witnesses had. Although, as I have already said, the judge did not say in so many words that he disbelieved Mr. Juma's evidence, he clearly did not consider it to be reliable. Having accepted as "more believable" the evidence given by the appellants' witnesses, the judge by necessary implication considered the evidence of the respondents' witnesses, including Mr. Juma, to be less worthy of credit. I am satisfied that the learned judge subjected all the relevant evidence to careful scrutiny, and I have not been persuaded that he wrongly evaluated the evidence or drew any unjustified inferences from it, so as to require this Court to make its own evaluation and draw its own inferences. In my opinion the cross-appeal fails and should be dismissed.

I now turn to the appeal against the learned judge's finding that the respondents were not liable for the consequences of the negligence of one of the boatmen, in carelessly and violently causing Mrs. Selle to fall, on the grounds that the boatman in question was one of a number of independent contractors who were operating the respondents' boat, and not a servant of the respondents. The learned judge's finding is as follows:

"I am therefore of the view that the boatmen and their managing committee were not acting as servants of the defendants at the material time. I hold that they were acting as agents of the defendants. I further hold that they were, in the circumstances of the case, acting for the defendants not in the capacity of servants but in the capacity of independent contractors."

Counsel for the appellants conceded that the boatmen were not servants of the respondents in the full sense, but he submitted that they were agents discharging duties and liabilities for the benefit and purposes of the respondents, and that the respondents could not therefore escape liability for the negligence of the boatmen. Clearly the respondents' boats were being operated for their benefit by the boatmen and their committee, as the respondents received sixty per cent. of the gross takings. Counsel for the respondent submitted that on a true construction of the arrangement between the respondents and the boatmen, there was a hiring or charter of the boats by the respondents to the boatmen who then operated the boats as independent contractors. In my view, this cannot have been the position; for one thing, it was never pleaded that the boats were hired, and for another, not one of the boatmen called as witnesses for the respondents contended that the boats were hired. On the contrary, Bushiri bin Waziri deposed as follows:

"These boats belonged to firm called Associated Motor Boat Company. I controlled the boats on behalf of . . . the company . . . the owners could have taken the boats any time . . . I could not prevent them taking away the boats."

It seems to me clear that no question of hire arises, and that the boatmen and their committee operated the boats as agents for the owners, the respondents, and I agree with the learned judge's finding in this respect.

The question now arises whether the boatmen were agents for whose torts a principal would be liable or wholly independent contractors. The learned judge found that they were not servants, because the respondents had no control over the manner in which they did their work and did not employ them directly. But, with respect, the judge does not seem to have considered whether the boatmen did not fall within the category of agents who perform duties on behalf of a principal in circumstances creating liability on the part of the principal for their negligence in the performance of their duties. A case in point is *Ormrod v. Crosville Motor Services Ltd.* ([1953] 1 All E.R. 711), in which the owner of a car requested a friend to drive it to Monte Carlo, where the owner wanted to use it. This was an act done for the owner's benefit, and the driver was held to be the owner's agent in so driving the car, and the owner was held vicariously liable for his negligence. Another case is *Smith v. Moss* ([1940] 1 All E.R. 469), in which a lady, who could not drive, owned a car, and paid for insurance, licence fees and all running repairs. Her son drove the car for her whenever she wanted to use it. It was held that he did so as his mother's agent, and that she was liable for his negligence when so driving. The similarity between these cases and the one now under consideration is apparent. The respondents were the registered owners of the boat in question; they paid the licensing fee, defrayed the cost of repairs and maintenance, and provided the necessary fuel for its operation.

Instead of operating the boat through servants directly employed by themselves, they allowed the boatmen to operate the boat and retain part of the gross takings as their remuneration, the greater part being paid to the respondents. They retained the right of control over the boat. It was their duty, as common carriers licensed under the Port Rules, to transport passengers between ships and the shore. It seems to me inescapable that under these conditions the boatmen were not wholly independent contractors but were the respondents' agents in circumstances making the respondents vicariously liable for their negligence, and I would accordingly allow this appeal and direct that judgment be entered for the plaintiffs. As to the amount for which judgment should be entered, it is most unfortunate that the learned judge made no finding in this respect. It is always desirable, in a suit for damages, for the trial judge to make a finding as to the amount to which he thinks the plaintiff would be entitled if successful, even though he gives judgment for the defendant. Much time and expense can be avoided if this course is followed. As it is, I can see no alternative other than to remit this case to the High Court of Zanzibar, with a direction to the judge to adjudicate upon the issue of damages, and to enter judgment for the first and second appellants for such sums by way of special and general damages respectively as he shall deem fit.

I would allow this appeal and dismiss the cross-appeal.

Duffus JA: I have read and entirely agree with the judgments of the learned Vice-President and Law, J.A.

The facts established in this case show that the respondents owned and maintained a small fleet of boats for the purpose of plying for hire in Zanzibar Port. They did this under a licence issued under the Port Rules of Zanzibar. The appellants were, at the time of the accident to the second appellant, passengers for reward in one of the boats being operated for hire under this licence. The second appellant was severely injured as a result of the negligence of one of the boatmen employed to run the boat. The difficulty in this case is caused by the fact that the actual running of the boats was entrusted by the respondents to the boatmen themselves, who appear to have had a management committee who were the persons actually in charge of the everyday running of the boats, and the employment of and dismissal of the boatmen. The boatmen and the committee were not paid a salary but shared in the gross profits with the owners, the respondents. The respondents not only owned the boats and were issued with the licence to run these boats for hire, but they also carried out the maintenance and repairs, and paid for the fuel used, and they also shared in the gross profits receiving sixty per cent. of the total takings.

On these facts it is, in my view, abundantly clear that the committee and the boatmen were acting as agents for the respondents and were running the respondents' boats on their behalf. The boats were owned by the respondents, they were run under the licence issued to the respondents, on their behalf, and for their benefit. The law applicable has been fully set out and explained in the judgments of the Vice-President and Law, J.A., and in the circumstances of this case, the respondents are liable for the negligence of the boatmen.

I agree, therefore, that the appeal be allowed and the cross-appeal be dismissed in the terms of the order proposed by the learned Vice-President.

Appeal allowed. Cross-appeal dismissed.

For the appellant:

CW Salter, QC and AS Talati

Wiggins & Stephens, Zanzibar

For the respondent:

JM Nazareth, QC and MA Lakha

Lakha & Co, Zanzibar

Ombeka (alias Maranga) v Republic
[1968] 1 EA 132 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	2 October 1967
Case Number:	721/1967 (21/68)
Before:	Sir John Ainley CJ and Trevelyan J
Sourced by:	LawAfrica

[1] Criminal Procedure – Name – Accused convicted in the name of another person – Effect.

Editor's Summary

The appellant, whose true name was Augustino Ombeka, was convicted in the name of Daniel Maranga of offences under the Wild Animals Protection Act. He appealed on several grounds, but the only ground which is here reported concerns the effect of his conviction in another name. At the trial he answered to the name of Daniel Maranga and admitted that he was guilty of acts (namely, being in possession of game trophies received from unauthorised persons which trophies he re-sold without sale permits to a third party), upon which he was convicted.

Held – in this case on the facts the right man had been convicted and it was not a case where a man chose to suffer for the sins of another.

Appeal dismissed.

No cases referred to in judgment

Judgment

Trevelyan J: read the following judgment of the Court: In this case the appellant was convicted under the name of Daniel Maranga Nyaribo of two offences, the first being the illegal possession of game trophies contrary to s. 33 (1) of the Wild Animals Protection Act, and the second was either the offence created by s. 34 (2) of that Act, that being the subsection under which the appellant was charged or the offence created by s. 34 (1) of the Act, that being the offence of which particulars were given. We will deal with this matter later.

It is perfectly clear to us that the appellant answered to the name of Daniel Maranga Nyaribo when he

appeared before the court below on June 8, 1967. He pleaded that he was not guilty of the offence contrary to s. 33 (1) but it is clear that he then pleaded guilty (subject to what we have already said about the charge) to the second offence. The record of the proceedings relative to that plea leaves us in no doubt that the appellant, to whom the number of the sub-section would mean nothing, was in fact admitting that he was guilty of the act set out in the particulars to the charge, that is to say the offence of selling trophies without what is called a sale permit from the Chief Game Warden. The prosecution explained the situation with considerable care to the court below, and the appellant was then given an opportunity, which he took, to speak in mitigation. He said that he had a dealer's permit and thought that this entitled him to sell trophies without more pieces of paper. It is expressly stated in sub-s. (4) of s. 35 of this somewhat confusing Act that the grant of a dealer's permit does not absolve the holder from compliance with s. 34, so that the appellant's belief, if genuine, was erroneous. However there was here an intelligent plea in mitigation of a clearly admitted offence. The magistrate fined the appellant Shs. 1,500/-.

To the charge under s. 33 (1) of the Act, it will be remembered, the appellant had pleaded that he was not guilty. The learned magistrate had intimated that

the hearing of this charge would take place during the following month, but towards the end of the day the appellant clearly indicated that he desired to change his plea. He was re-charged and said, "I admit the charge. I was in illegal possession of all these trophies. They were not obtained from authorised persons". On that plea he was very properly convicted. The prosecutor then outlined the facts. He said, in effect, that the trophies, which consisted of many pieces of elephant ivory, a rhinoceros horn, a cheetah skin and a leopard skin had been bought near the Kisii border for well over £200, from poachers.

The appellant was then given the opportunity of pleading in mitigation. In view of what we shall say later his plea, because it is quite obviously a very personal plea, is worth repeating. He said: "I am old, forty-six years old. I have twelve children and two wives. I am sorry". For the offence which he admitted, and it was a very serious offence, he was sent to prison for eight months.

The appellant then appealed. He said, and now says, that his name is not Daniel Maranga; his name, he says, is Augustino Ombeka. Daniel Maranga, he asserts is his partner in the firm of "Amage Company", and this company deals in trophies and the like. It is in fact Daniel Maranga who holds the dealer's permit, for the company. We do not doubt the truth of all this, though we would point out that the existence of this dealer's permit is irrelevant to both the charges.

What we fail to see is how the facts alleged by the appellant avail him. It has been argued on behalf of the appellant that the conviction is a nullity, because, as we understand the argument, the man convicted was not the man charged, and the prosecution having set out to convict Daniel Maranga has secured unwittingly and unintentionally the conviction, not necessarily of an innocent man, but of a man against whom they did not prefer a charge; a man against whom they had no intention of preferring a charge.

We have read the affidavit of the appellant, but we see nothing in that affidavit which makes us suppose that the prosecution have made any mistake save in the name of the person whom they charged. Upon the face of things the prosecution made no mistake as to the true identity of the person who, to quote the particulars of the first charge "at Kaptagat Farm in Uashin Gishu District . . . was found in possession of forty pieces of elephant tusks . . . one Rhino horn, one leopard skin, and one cheetah skin" and who sold these trophies to one Mr. Morat as alleged in the second count. It is wholly unreasonable to suppose that this person was other than the appellant. The appellant not only admitted that he was the person found in possession of these trophies, and that he was the person who sold them, but he excused himself intelligently for selling them and made a plea for mercy in respect of the unlawful possession, based upon his own family circumstances. It has not been suggested that the twelve children and two wives to which he referred were the dependants of Daniel Maranga. We do not understand his learned counsel to suggest that he was not the person who committed the two offences in question, and we cannot ignore the appellant's statement when bail was applied for on his behalf, "I myself bought the trophies named in the charge. It was I who sold these to Morat".

We do not know exactly why the appellant answered to his partner's name in court, as he obviously did, but we are quite satisfied that he did so deliberately and not because he was confused or misled. A cynic might say that if the appellant had pointed out the error in the name to the court there would have been a fresh charge or an amendment of the old one and a cast iron conviction; but by saying nothing the appellant obtained a release on bail and the chance that this court would accede to the arguments of his learned counsel, and that the appellant realised that.

We doubt whether the appellant thought quite so clearly, and the truth may simply be that he saw no particular reason to assist the court or the prosecution in the matter. However, his reasons for answering to this name are not of great moment. This was not a case where a man chose to suffer for the sins of another. Such cases raise special problems no doubt and the objection to allowing the situation which arises in such cases to go unchanged does not need stating. But in this case the right man has been convicted and punished on the most satisfactory of all evidence, his free, unequivocal, and unretracted admission of guilt. The only objection to leaving matters as they are in the present case is that the conviction will be written against the wrong name in the records of the police and of the courts. Had the court below known of the error made in the naming of the accused that court could have set the matter right, and would have set the matter right. We have power to do what the court below could and would have done on a proper understanding of the situation, and we direct and order that the record of the court below shall be amended so as to show that the person convicted in Criminal Case 895 of 1967 of the Resident Magistrate's Court at Eldoret was Augustino Ombeka and that the police and prison records be amended accordingly.

We have already mentioned the error made in drafting the second count in this case, and we indicated that we would return to the matter. It appears to us very obvious that the invocation of sub-s. (2) of s. 33 was due to inadvertence. We have indicated that the appellant admitted the offence which the prosecution intended to charge and did in effect charge by the form of the particulars. We have no hesitation therefore in substituting for the conviction under s. 33 (2) a conviction under s. 33 (1) of the Wild Animals Protection Act, and we do so.

The sentences were not excessive. The appellant is the kind of person it is proper to punish severely. He was clearly acting as a middleman between game poachers and the buyers of trophies, and deserves no sympathy.

His appeal is dismissed.

Order accordingly.

For the appellant:

Shaikh Amin

Shaikh Amin, Nairobi

For the respondent:

JR Hobbs (Deputy Public Prosecutor, Kenya)

Attorney-General, Kenya

Dadacha and others v Republic
[1968] 1 EA 135 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 11 January 1968

Case Number: 969, 960, 974 and 975/1967 (35/68)

Before: Rudd and Dalton JJ
Sourced by: LawAfrica

[1] Criminal Law – Receiving – Possession – Meaning of joint possession in relation to cattle severally owned and jointly driven to market.

Editor's Summary

Five accused joined together and allowed their respective cattle to be driven as a single herd of thirty-two head to market. Subsequently it was proved that four of twelve head of cattle, which had been stolen a month earlier, were in this head of thirty-two cattle. The five accused were all convicted of receiving cattle knowing them to have been stolen. Four of the five accused appealed. It was not proved that any of the four appellants had brought one or more of the four stolen head of cattle into the herd.

Held – each of the five accused was only in possession of the cattle in the herd which he was taking to market to sell for himself. The whole herd was not to be in the joint possession of the five accused.

Appeals allowed.

No cases referred to in judgment

Judgment

Rudd J: delivered the following judgment of the Court: These appeals were consolidated. In the month of April twelve head of cattle were stolen at Garbatulla in the Isiolo District. About one month later four of these cattle were found in a herd of thirty-two cattle which were being taken to a cattle market at Madogashe by the appellants and a fifth man.

It is a common practice in the district for a number of people with cattle to sell at such a market to join together and drive their cattle to the market in a single drove and that was what was being done in this instance. In such a case we do not think that the five owner drivers of the cattle were in joint possession of the whole herd. We consider that each one was only in possession of the cattle in the drove which he was taking to market to sell for himself. We do not think that any owner relinquished his right as a possessor to the others jointly with himself. In the absence of other circumstances indicating guilt, it was therefore necessary for the prosecution to prove that each of the five owner cattle drivers had brought one or more of the stolen cattle into the drove. The prosecution was unable to prove this as against any of the appellants. For this reason the convictions of the appellants of receiving stolen cattle knowing them to have been stolen cannot stand.

The case of the second appellant is a little different from the others inasmuch as he tried to run away when he saw the police approaching the drove whereas the first, third and fourth appellants made no attempt to run away. We think his conduct in attempting to escape indicates that he had some guilty knowledge of some at least of the stolen cattle in the drove and that he knew they were stolen but the fact that he had such knowledge, if it be true, does not establish that he had received or was in possession of any of the stolen cattle.

The fifth driver was also convicted but does not appear to have appealed. He claimed to have brought

ten cattle into the drove and may have been the

person who received all four of the stolen cattle. The magistrate was not to know that this fifth accused would not appeal. However we think the circumstances insofar as we now know them indicate a distinct possibility that the fifth accused alone was the guilty man.

This shows the danger of injustice that could arise if the appeal of the second appellant were dismissed.

We allow all four appeals and set aside the convictions of the appellants and the sentences imposed upon them in this case.

Appeals allowed.

The appellants were not represented.

For the respondent:

HGD Graham (State Counsel, Kenya)

Attorney-General, Kenya

Mwambola v Republic **[1968] 1 EA 136 (HCT)**

Division:	High Court of Tanzania at Mwanza
Date of judgment:	1 November 1967
Case Number:	3/1967 (42/68)
Before:	Mustafa J
Sourced by:	LawAfrica

[1] *Criminal Law – Bail – Official and Other Secrets Act – Whether bail can be granted on a charge under that Act – Official and Other Secrets Act, ss. 13 and 17; Criminal Procedure Code, s. 123 (T.).*

[2] *Criminal Law – Official secret – Whether offence under Official and Other Secrets Act is bailable – Official and Other Secrets Act, ss. 13 and 17; Criminal Procedure Code, s. 123 (T.).*

Editor's Summary

A subordinate court cannot grant bail for an offence under the Official and Other Secrets Act after the consent of the Director of Public Prosecutors has been obtained and proceedings commenced, although the High Court has jurisdiction to do so.

Bail granted.

No cases referred to in judgment

Judgment

Mustafa J: This is an application for bail. Applicant Oscar Mwambola who, his counsel informs me, at the material time was the area commissioner, Nzega, was charged with an offence under the Official and Other Secrets Act, Cap. 45 of the Laws. The charge is “communicating official secret to an unauthorised person contrary to s. 5 (1) (a) of Cap. 45 of the Laws of Tanzania”. The applicant was apparently arrested on September 21, 1967, and was charged before the district magistrate, Nzega. He has been in custody since.

Counsel for the applicant applied for bail on October 21, 1967, and the district magistrate refused bail. It appears that the police had no objection to bail. The district magistrate gave the following ruling on October 23, 1967:

“Surely s. 13 states clearly that the offence under Cap. 45 is non-bailable but then s. 17 of the same Ordinance (Cap. 45) shows that an accused

person may be remanded in custody or on bail. It is clear, therefore, that s. 17 of Cap. 45 refers that matter back to s. 3 (2) and s. 123 of the Criminal Procedure Code. The accused in this case is not charged with murder or treason where bail cannot be granted . . .”

The district magistrate thereupon came to the conclusion that s. 13 of Cap. 45 is mandatory and held that he had no discretion to grant bail and he, therefore, refused bail.

Applicant now applies for bail to this court under s. 123 of the Criminal Procedure Code. I appreciate the difficulty of the district magistrate. Section 13 of Cap. 45 reads:

“For the purposes of the Criminal Procedure Code, every offence under this Ordinance shall be deemed to be a cognisable and non-bailable offence.”

Section 17 reads:

“A prosecution for an offence under this Ordinance shall not be instituted except by or with the consent of the Director of Public Prosecutions;

Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody or on bail, notwithstanding that the consent of the Director of Public Prosecutions to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.”

Apparently, these two sections in the same Act gave rise to some difficulty. To my mind, it is clear that before there can be a prosecution for an offence against the Official Secrets Act, the consent of the Director of Public Prosecutions must be obtained. However, a person may be charged with an offence and arrested before such consent is obtained and when he is so charged and arrested, bail in terms of s. 17 may be granted. The provisions of s. 13 only come into operation after consent from the Director of Public Prosecutions has been obtained when the offence shall be deemed to be “a cognisable and non-bailable offence.”

In this case, it has been pointed out that no consent from the Director of Public Prosecutions has been obtained to date, nor, according to learned senior state attorney, who does not oppose the application for bail, has any request for such consent been sought. The district magistrate, therefore, could have, in terms of s. 17 of Cap. 45, granted bail, if he was so minded to do.

I think, although it is not necessary, it will perhaps be appropriate for me to consider the provisions of s. 13, *supra*. According to the Criminal Procedure Code, the relevant provisions of bail are contained in s. 123. It reads:

“123. (1) When any person, other than a person accused of murder or treason, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person may be admitted to bail:

. . . .

(3) Notwithstanding anything contained in subsection (1) of this section the High Court may in any case direct that any person be admitted to bail or that the bail required by a subordinate court or police officer be reduced.”

It seems to me that a subordinate court can grant bail for any offence apart from the offence of murder or treason. It would seem to me, therefore, that according to the provisions of s. 13, an offence against the provisions of Cap. 45 is equated with murder or treason for purposes of bail and a subordinate court cannot grant bail for an offence under the Official and Other Secrets Act after the consent of the Director of Public Prosecutions has been obtained and proceedings commenced. I think that is what is meant by the word “non-bailable” in s. 13 of Cap. 45. However, even then the High Court would have jurisdiction to grant bail in the same way as it can grant bail in cases of murder or treason. Needless to say, it would be extremely rare indeed that bail is granted for murder or treason and I would think that would also apply to bail for an offence under the Official and Other Secrets Act.

As I have said, learned senior state attorney does not oppose bail and that is a factor which I will take into consideration. It also seems to me that the district magistrate perhaps would have granted bail but for his view that he was precluded from so doing.

In the circumstances, I grant the applicant bail in the sum of Shs. 2,000/- with two sureties in the sum of Shs. 2,000/- each to the satisfaction of the district magistrate, Nzega, who is directed to take the necessary steps in conformity with this order.

Order accordingly.

For the applicant:

DN Parekh

DN Parekh, Mwanza

For the respondent:

SMB Tukunjoba (Senior State Attorney, Tanzania)

Attorney-General, Tanzania

Masita v Republic
[1968] 1 EA 138 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	22 November 1967
Case Number:	785/1967 (43/68)
Before:	Duff J
Sourced by:	LawAfrica

[1] *Criminal Law – Sentence – Minimum sentence – “Special circumstances” – Dependants – Whether plea that accused has dependants can be considered as a special circumstance – Minimum Sentences Act, s. 5 (2) (T.).*

Editor's Summary

A plea by an accused that he has dependants is one which can be considered and accepted as constituting special circumstances under the Minimum Sentences Act, s. 5 (2).

Sentenced varied.

No cases referred to in judgment**Judgment**

Duff J: The accused, a tax clerk employed by Dodoma District Council and a first offender, was convicted of forgery contrary to s. 337 of the Penal Code and of theft by a person employed in the public service contrary to ss. 270 and 265 of the Penal Code. The facts were not disputed as the accused readily accepted that he received Shs. 20/- by way of fee for a pombe licence and that whilst the original issued by him showed this

amount, the duplicate which was retained in the District Council office acknowledged the receipt of Shs. 5/- only, the accused pocketing the difference. A sentence of nine months' imprisonment was imposed on the first count while on the second count the accused was sentenced to two years' imprisonment, the statutory twenty-four strokes of corporal punishment accompanying the sentence. He now appeals against sentence only.

The record of the lower court indicates that the accused was invited to adduce special circumstances within the meaning of the Minimum Sentences Act, Cap. 526, and in reply the accused said: "I have no father. I have two brothers who are schooling, they depend on me. I have got three children. They also depend on me". The accused was again addressed as to special circumstances, and he further replied "As I have already said, I have got dependants on me". In sentencing the accused the learned magistrate said "Despite being addressed in terms of special circumstances the accused failed to advance any which could properly be taken into account."

Opinions differ as to what special circumstances entail although it is clear from s. 5 (4) of the Minimum Sentences Act, Cap. 526, that they include circumstances relating to the commission of the offence and to the person who committed it. This is quite a wide definition, in my view, and I believe that possibly too narrow a restriction is placed on the meaning by some courts. In one case it was held that the accused's good character and the trifling amount involved in the offence were special circumstances, while in another case it was held that special circumstances must exist in addition to the provisions of s. 5 (2) (a) and (b) of the Act being satisfied. From the latter case it may be suggested that special circumstances must be considered separately from the question of the amount or value involved.

In the present case I do not have to enter into the arena as to the correct interpretation of the relevant section of the Act, as it appears to me that in putting forward the plea that he had dependants the accused was speaking of special circumstances. It is true that in most criminal cases dependants are involved and suffer as a result of the incarceration of the convicted person. I believe, however, that this particular plea was one which could have been considered and accepted by the learned magistrate as constituting special circumstances. It seems to me that if an inquiry is made by a court into the circumstances of an accused person prior to and after the commission of the offence, little difficulty may arise in interpreting what special circumstances constitute. As I have already stated, the expression "special circumstances", having regard to s. 5 (4) of Cap. 526, is extremely wide, and I have no hesitation in holding on the facts of this case that the three requisites required by s. 5 (2) were satisfied. Accordingly the sentences imposed by the learned magistrate are set aside together with the order for corporal punishment, and in lieu thereof the accused is sentenced to four months' imprisonment on each count, the sentences to run concurrently. The appeal succeeds to that extent.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

KRK Tampi (State Attorney, Tanzania)

Attorney-General, Tanzania

[1968] 1 EA 140 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam
Date of judgment: 8 November 1967
Case Number: 754/1967 (44/68)
Before: Georges CJ
Sourced by: LawAfrica

[1] Criminal Law – Corruption – Ten-house cell leader of T.A.N.U. – Whether acting “in relation to his principal’s business” in threatening arrest – Prevention of Corruption Ordinance, s. 3 (1) (T.).

Editor’s Summary

The appellant was a ten-house cell leader of T.A.N.U. who was convicted of a corruption for having taken a bribe “for forbearing to arrest” the complainant on a charge of cattle theft. On appeal:

Held – a ten-house cell leader has no powers of arrest and in purporting to threaten an arrest the appellant was not acting “in relation to his principal’s (i.e., T.A.N.U.’s) affairs or business” within s. 3 (1) of the Prevention of Corruption Ordinance.

Appeal allowed.

No cases referred to in judgment

Judgment

Georges CJ: The appellant was charged with “Corrupt transaction c/s 3 (2) (a) of the Prevention of Corruption Ordinance, Cap. 400 of the Revised Laws”. The particulars allege that the appellant “being a leader of ten houses, did by himself corruptly solicit and obtained the sum of Shs. 100/- from Sinda s/o Jingu for himself as a reward for forbearing to arrest the said Sinda s/o Jingu on a charge of cattle theft in relation to his business”. The appellant was convicted and the minimum sentence imposed – without strokes, as he was over 45.

The first observation is that the section in respect of which the charge has been laid has not been properly quoted. The Prevention of Corruption Ordinance, Cap. 400, does not have a section numbered 3 (2) (a). Section 3 has three subsections, (1), (2) and (3). The third subsection has two sub-subsections, (a) and (b). That section deals with punishment. The offence with which this appellant is charged falls under s. 3 (1) of the Ordinance. While it is the case that such errors may be corrected under the somewhat wide powers given to this Court under s. 346 of the Criminal Procedure Code, it is of importance that prosecutors and magistrates should check and make sure that the details of charges are properly set out. Principally, the duty lies on the prosecutor, but magistrates are advised as a matter of routine to check the charge against the Ordinance to see if it is correct, and if it is not, to see that an amendment is sought to remedy the defect. It is of the essence of the proper administration of justice that nothing should be taken for granted and that nothing should be slipshod.

As I have mentioned, the section under which it was intended the appellant should be charged was s. 3 (1), which reads in part:

“Any person . . . who corruptly solicits, accepts, obtains or agrees to accept or attempts to obtain, from any other person any consideration as an inducement to, or reward for, or otherwise on account of, any agent (whether such agent is the same person as such first mentioned person or

not) doing, or bearing to do, or having done or forborne to do, anything in relation to his principal's affairs or business, shall be guilty of an offence."

The main witness for the prosecution was Sinda s/o Jingu. He stated that the appellant, a ten-house cell leader, and one Abdulla Mwanga, a member of the T.A.N.U. Youth League, came to his house one day and, in his own words:

"They informed me that I was wanted at the police station as I had stolen cattle during the . . . time; they informed me that if I did not want to go to the police station, I must offer Shs. 200/- to help myself so that they may not arrest me for the theft of cattle I had committed long ago . . . I did give them some money."

Sinda's wife confirmed his story. She said:

"When they came, it was about midday; in the house there was me and my husband. When they arrived they told my husband that they were arresting him for having stolen cattle some time ago and were going to send him to Ilongero, but as they were about to go, they informed my husband that he should defend himself. The words were stated by the accused, that my husband should give money about Shs. 100/-. My husband did produce the money and he was not taken by them."

In order to establish the offence, it is necessary to prove that the appellant had corruptly taken money for doing or forbearing from doing some act in relation to his principal's business.

The accused is a ten-house cell leader, and his principal would be T.A.N.U. The position of a ten-house cell leader is one known to law. It is provided for in the constitution of T.A.N.U., which is set out as a schedule to the Interim Constitution of Tanzania, Act No. 43 of 1965.

Article 14 A reads as follows:

"The Cell

1. The basic organ of T.A.N.U. shall be the cell.
2. A cell shall consist of ten houses grouped together for the purpose.
All T.A.N.U. members living in those ten houses shall comprise a cell.
3. Each cell shall elect a leader who will have overall charge of the affairs of the party in that cell and who will be its delegate to the branch annual conference."

It would appear, therefore, that a ten-house cell leader is a political officer. His duties are in relation to the party. As a good citizen and a party leader, he must undoubtedly assist the administration wherever possible and promote the plans which government seeks to implement. Further, as a good citizen and a party leader, he will co-operate with the police in ensuring that law and order are maintained and that offenders are apprehended and charged before the courts. He will make available such information as he has so that proper evidence can be forthcoming to secure a conviction where possible. In the performance of these responsibilities, he is no more acting in relation to his principal's business than would be any other citizen so acting, for it is the duty of every citizen to co-operate with the forces of law and order and assist in the promotion of agreed plans and projects. One would expect these qualities to be displayed more strikingly in the ten-house cell leader because his post imposes an obligation to set an example.

Clearly, the ten-house cell leader has no powers of arrest above those which the law allows the citizen. Where a situation arises which requires the detention of

a person, he can do no more than any other citizen could do pending the arrival of the police. It may be that the moral and political authority of his office will induce others to respect his orders in a way in which the orders of a mere party member would not be respected.

I am of the view, therefore, that when the appellant purported to threaten arresting Sinda for some cattle theft he had committed long ago, he was not acting “in relation to his principal’s affairs or business”.

I am aware that the conduct of a person charged with an offence under s. 3 of Cap. 400 need not necessarily be lawful conduct – nor need the offender have the power to affect any course of action in the manner in which he may allege that he was able to affect it. For example, a police officer who took a bribe on the promise that he would have a prosecution withdrawn could be convicted even if it were conclusively established that he had no power to do what he promised. Dealing with prosecutions would be part of the policeman’s business in relation to his principal – the government. The limitations of his powers in that regard would be an internal matter, of which the person paying the bribe may be completely ignorant.

On the other hand, I am satisfied that taking people into custody is not part of a ten-house cell leader’s business in relation to his principal, T.A.N.U. As I have sought to indicate, when he acts in such a role, he has acted merely as a zealous and public-spirited citizen – which all ten-house cell leaders ought to be. In cases such as this, it strikes me that the appropriate charge would be demanding money with menaces, contrary to s. 292 of the Penal Code.

This finding is enough to dispose of the appeal, but I think two points deserve comment. The learned magistrate states in his judgment:

“From the evidence in front of me, there is evidence that there was a Presidential Order that cattle thieves be detained, even those who committed the offence long ago.”

I have looked carefully through the record, and I am quite unable to find any such evidence. Indeed, the record makes no reference to the President at all – still less to the terms of the order referred to. Findings must be based on evidence led in court, not on what may be known as common knowledge, unless they are facts of which judicial notice may be taken.

The second comment is in connection with counsel for the respondent’s argument that there was no adequate corroboration in this case. I am of the view that in law there is. Clearly Sinda would be a party to the offence had the charge been proper. His wife Sita, however, would not be – nor would his sons Joachim, Mjengi and Jingu. It is true that they are members of one family and one would take that into consideration in assessing the weight of their evidence. In his judgment, the learned magistrate does not mention the matter of corroboration – nor does he seem to have realised that Sinda was an accomplice. There is no comment either on the fact that all the witnesses for the prosecution are closely related and could have family reasons for solidarity. Had he specifically mentioned these matters or indicated clearly that he had taken them into consideration before reaching his conclusion, I do not think his decision on the facts could be faulted.

His failure to deal with them, however, would be a matter of serious misdirection. It could not be said with certainty that had he directed himself properly, he would inevitably have come to the conclusion to which he did. I think on this basis the conviction could also be said to be bad.

Accordingly, it is set aside and the sentence is quashed. The appellant is to be released unless otherwise lawfully detained.

Appeal allowed.

The appellant in person.

For the respondent:

Kisanga (State Attorney, Tanzania)

Attorney-General, Tanzania

Manager Tank Building Contractors v Republic [1968] 1 EA 143 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	4 October 1967
Case Number:	544/1967 (46/68)
Before:	Saidi J
Sourced by:	LawAfrica

[1] *Advocate – Plea – Whether advocate can enter plea of guilty when attendance of accused not dispensed with – Criminal Procedure Code, ss. 99 and 203 (T.).*

[2] *Criminal Law – Plea – Attendance of accused not dispensed with – Whether advocate can enter plea of guilty on behalf of accused – Criminal Procedure Code, ss. 99 and 203 (T.).*

Editor's Summary

The appellant was accused of offences under the Factories Ordinance. He was served with the summons and instructed an advocate to appear for him, but his own attendance at the trial was not expressly dispensed with. The advocate appeared and pleaded guilty on behalf of the accused. On appeal (against sentence):

Held –

- (i) it is only in cases where the attendance of an accused person is expressly dispensed with that an advocate is entitled to plead for him. In all other cases, only the accused person and he alone can plead to the charge brought against him;
- (ii) (obiter) there is nothing wrong, except in cases of grave offences, in a plea of guilty being recorded against an accused whose attendance is not dispensed with but who pleads guilty in writing and appears by advocate.

Conviction quashed. Case remitted for retrial.

Case referred to:

(1) *D.P.P. v. Vincent Mtefu* (Criminal Appeal No. 210 of 1965) Tanzania Supplement No. 1 of 1967.

Judgment

Saidi J: This is an appeal against sentence, the grounds of complaint being that the learned resident magistrate did not properly take into consideration the facts put before him in mitigation.

The appellant was charged on five counts relating to breaches of certain conditions of the Factories Ordinance, Cap. 297 of the Laws. Having been served with the summons, he briefed Mr. Lilani, an advocate of Mtwara, to appear for him. When the case first came up for hearing in court on June 28, 1967, Mr. Lilani told the court that he was instructed to plead guilty to all the

five counts. In consequence a plea of guilty was entered on each count, and after the senior labour officer had stated the facts of the case the appellant was convicted as charged on each count. There followed a submission in mitigation, and thereafter the appellant was fined Shs. 500/- in respect of Count 1, Shs. 200/- in respect of Count 2, Shs. 300/- in respect of Count 3, Shs. 100/- in respect of Count 4, and Shs. 200/- in respect of Count 5, or distress in default of payment of any of these fines. It is against the severity of the sentence that this appeal has been brought.

Learned counsel who appeared for the Republic, was of the view that the pleas of guilty made by the advocate on behalf of the appellant were not valid. I entirely agree with him. A situation somewhat similar to this arose in Criminal Appeal No. 210 of 1965, *D.P.P. v. Vincent Mtefu*, reported in Supplement No. 1 of 1967. In that case also an advocate had pleaded guilty in court on behalf of the accused. Bannerman, J., held:

- “(i) The only exception in which an advocate can plead on behalf of an accused person is provided for in s. 99 of the Criminal Procedure Code in cases where the personal attendance of the accused is dispensed with and appearance is by an advocate.
- (ii) The statement of the advocate ‘We plead guilty to the first count’ was not a plea at all.”

I am of the same view that the plea made by the advocate on behalf of the appellant in this case is not a valid one, because I can find nothing in the record showing that the attendance of the appellant before the trial court had been expressly dispensed with under s. 99 of the Criminal Procedure Code. It is only in such cases where the attendance of an accused person is dispensed with that an advocate is entitled to plead for him. In all other cases, as can be seen from the contents of s. 203 of the Criminal Procedure Code, only the accused person and he alone can plead to the charge brought against him. This section requires that the substance of the charge shall be stated to the accused person by the court and he shall be asked by the court whether he admits or denies the truth of the charge. If he admits the truth of the charge his admission shall be recorded by the court as nearly as possible in the words used by him and the court shall convict him and pass sentence on him or make any other order it may deem fit unless there shall appear to it sufficient cause to the contrary. If he does not admit the truth of the charge, the court shall proceed to hear the case according to the provisions of the Criminal Procedure Code.

It may be argued that a plea of guilty could still be recorded against an accused whose attendance is not dispensed with under s. 99 of the Criminal Procedure Code but who pleads guilty in writing and appears by advocate who submits the plea of the accused in writing to the court and confirms that the accused is pleading guilty. Personally I can see nothing wrong with this course being accepted by the court in the majority of cases which are not grave offences and are punishable mostly by fines. This court will not be open to grave offences, which are normally punishable with prison sentences.

In the result the conviction is quashed and the fines are set aside. The record is returned to the district court of Mtwara with a direction that the appellant should be retried.

Order accordingly.

The appellant in person.

For the respondent:

EO Effiwatt (State Attorney, Tanzania)
Attorney-General, Tanzania

Republic v Saidi
[1968] 1 EA 145 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam
Date of judgment: 15 November 1967
Case Number: 167/1967 (47/68)
Before: Biron J
Sourced by: LawAfrica

[1] Criminal law – Failing to report accident – Does not include accident causing damage to dwelling-house.

[2] Street traffic – Failing to report accident – Does not include accident causing damage to dwelling-house – Traffic Ordinance, ss. 61 (3) (b) and 70 (1).

Editor's Summary

The driver of a vehicle involved in an accident is only required to report the accident to the police if injury is caused to a person or animal (as defined) or damage is caused to another vehicle on the road but not to a dwelling-house at the roadside.

No cases referred to in judgment

Neither party appeared nor was represented.

Judgment

Biron J: The accused was convicted, on his own pleas, of careless driving and of failing to report an accident, and he was sentenced to fines respectively of Shs. 150/- or three months' imprisonment in default, and Shs. 75/- or imprisonment for two months in default. The facts which constituted the two offences were briefly that the accused, whilst driving a Bedford lorry, apparently on account of driving too fast, left the road and ran into a dwelling-house at the roadside.

The section whereunder the accused was convicted, s. 61 of the Traffic Ordinance, reads:

“(1) If, in any case, owing to the presence of a vehicle on a road, an accident occurs whereby –

(a) personal injury is caused to any person other than the driver of such vehicle; or

(b) damage is caused –

(i) to a vehicle other than such vehicle or a trailer drawn by such vehicle; or

(ii) to any animal, other than an animal in or on such vehicle or a trailer drawn by such vehicle,

the driver of such first-mentioned vehicle shall stop and, if required so to do by any person having reasonable grounds for so requiring, give his name and address, and also the name and address of the owner of the

vehicle and the identification mark of the vehicle.

- (2) Any other person in the vehicle at the time of the accident shall also, if required so to do by any such person aforesaid, give his name and address.
- (3) If, in the case of any such accident as aforesaid –
 - (a) the driver for any reason does not give his name and address to some person who would have reasonable grounds for requiring the same at the place at which the accident occurred; or
 - (b) personal injury is caused to any person other than the driver of the vehicle,

the driver shall report the accident to the nearest police station or to a police officer not below the rank of inspector within twenty-four hours of the occurrence thereof.

(4) In this section –

‘animal’ means any ox, bull, cow, horse, mule, ass, sheep, goat, pig or dog; and

‘driver’, in the case of a carriage, includes the person in charge of the carriage.”

It is thus apparent that driver of a vehicle involved in an accident is only required to report the accident to the police, if injury is caused to a person or animal as defined in the section or damage is caused to another vehicle on the road, but not to a dwelling-house at the roadside.

The conviction on the second count, which is not supported by the Director of Public Prosecutions, cannot therefore be sustained and is accordingly quashed, and the sentence imposed thereon is set aside. The fine, which, it is noted, has been paid, is to be refunded to the accused.

Order accordingly.

Mandavia v Rattan Singh [1968] 1 EA 146 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 December 1967
Case Number:	27/1967 (14/68)
Before:	Sir Charles Newbold P, Spry and Duffus JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Farrell, J

[1] *Practice – Deputy registrar – Power of, to order sale of property attached in execution of decree.*

[2] *Practice – Execution proceedings – Whether such proceedings part of a “suit” – Civil Procedure Act, ss. 2 and 89 (K.).*

[3] *Practice – Execution – Powers of deputy registrar to order sales of properties in execution of decree – Civil Procedure Act, ss. 38, 41 and 81; Civil Procedure (Revised) Rules 1948, O. 21, rr. 59, 60 and 61, and O. 48, rr. 3 and 4 (K.).*

[4] *Practice – Part heard case – Whether another judge may complete hearing without rehearing evidence – Execution proceedings – Civil Procedure (Revised) Rules 1948, O. 17, r. 10; Civil Procedure Act, s. 89 (K.).*

Editor’s Summary

Two applications under O. 21, r. 79 of the Civil Procedure (Revised) Rules 1948 were made to the High

Court by a judgment debtor (the appellant) to set aside the sale of three properties which had been attached and sold in execution of a judgment debt on the grounds of irregularities and fraud in the conduct and publishing of the sale. The irregularities alleged were misdescription of the property in the advertisements; failure to give a fresh notice under O. 21, r. 63; and that the appellant suffered injury as the properties sold for less than one quarter of their value. Miles, J., part heard the applications, and, on his retirement from the bench, under O. 17, r. 10 the hearing was completed before Farrell, J., who confirmed the sales under O. 21, r. 81 and dismissed the applications. On

appeal the appellant submitted (*inter alia*): (i) Farrell, J., had no jurisdiction to complete the hearing and should not have accepted the evidence of a witness given before Miles, J., under O. 17, r. 10; (ii) the deputy registrar had no jurisdiction to order the sales under O. 21, r. 59; (iii) Farrell, J., should have granted the applications under O. 21, r. 79.

Held –

- (i) the word “suit” used in O. 17, r. 10 (1) is defined in s. 2 of the Civil Procedure Act to mean “all civil proceedings commenced in any manner prescribed”, and s. 89 of the same Act states that the procedure relating to suits shall be followed so far as it may be applicable in all proceedings in any court of civil jurisdiction; therefore
- (ii) (per Duffus, J.A.; Spry, J.A. dissenting) Farrell, J. had jurisdiction to complete the hearing in these execution proceedings and at his discretion was entitled to complete the hearing without the hearing of evidence of the witness taken before Miles, J.;
- (iii) (per Spry, J.A.) s. 89 of the Act permits a judge to follow the procedure laid down for suits, so that the procedure was proper;
- (iv) (after considering ss. 38, 44 and 81 of the said Act, and O. 21, rr. 59, 60 and 61 and O. 48, rr. 3 and 4 and Form No. 27 Appendix O of the Schedule to the Rules) the deputy registrar had jurisdiction to order the sales under O. 21, r. 59;
- (v) Farrell, J., was correct in finding on the evidence that no irregularity occurred in the publishing and conducting of the sales of the properties and that the appellant suffered no injury through any irregularity or fraud.

Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Mansion House Ltd. v. Wilkinson* (1954), 21 E.A.C.A. 98.
- (2) *Bhagat Singh v. Ramanlal Chauhan* (1956), 23 E.A.C.A. 178.

December 14, 1967. The following judgments were read:

Judgment

Duffus JA: This is an appeal against a decision of the High Court dismissing two applications made under O. 21, r. 79 of the Civil Procedure (Revised) Rules 1948, to set aside the sale of three properties belonging to the appellant/judgment-debtor, which had been attached and sold in execution of the judgment debt.

Rule 79 provides as follows:

“79. Where any immovable property has been sold in execution of a decree, the decree-holder, or any person whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such

irregularity or fraud.”

Both applications were by way of notice of motion. The applications sought to set aside the sale of the three properties by reason of irregularities and fraud in the conduct and publishing of the sale, on the grounds, *inter alia*, that:

- (i) there had been a misdescription of the properties in the advertisements;
- (ii) there was a failure to give a fresh public notice under O. 21, r. 63; and

- (iii) the appellant had suffered substantial injury as the properties had been sold for less than quarter of their value.

The appellant filed an affidavit with various attachments in support of his application, and the respondent also filed an affidavit. Both applications were taken together and came on for hearing before Miles, J., on November 11, 1966. The appellant, who was at that stage represented by an advocate, appears to have then closed his case, relying on legal submissions and on the affidavit evidence. Counsel for the respondent then opened his case and called a witness, apparently without objection, a Mr. Stanley Lee Browne, a member of the firm of the auctioneers who sold the properties on the order of the court. This witness was fully examined and cross-examined by the advocates on both sides. The hearing was part heard and adjourned, and then the learned judge became ill and eventually retired from the bench without having been able to complete the hearing. The matter then came before Farrell, J. on February 13, 1967. On an application being made, Farrell, J., acting under the provisions of O. 17, r. 10 of the Civil Procedure Rules, proceeded with the hearing from the stage at which Miles, J., had left it. He also allowed the appellant to put in a further affidavit in reply and then heard further legal submissions from the advocates for both parties, before he delivered a considered decision which is now the subject of this appeal. The learned judge refused the application to set aside the sales and made an order confirming the sales in accordance with O. 21, r. 81.

The appellant, an advocate in Kenya, appeared in person on this appeal and argued with considerable ability various questions of jurisdiction and procedure. His submissions on the appeal may be divided into three parts thus:

- (1) That Farrell, J., acted without jurisdiction in proceeding with the hearing of the application at the stage Miles, J., had left it, and that the provisions of O. 17, r. 10 did not apply to the proceedings of this nature. The gravamen of his complaint refers to the acceptance of the evidence given by the witness Lee Browne before Miles, J. This point is covered by ground 1 of the appellant's memorandum of the appeal.
- (2) That the deputy registrar acted without jurisdiction in ordering the sale of the properties under O. 21, r. 59 and in the subsequent proceedings which he conducted. Ground 2 of the memorandum of appeal covers this ground.
- (3) That the judge should have granted the application under O. 21, r. 79 and set aside the sales. This is covered by ground 4.

The appellant also had a further ground of appeal (ground 3) complaining that the judge failed to observe the distinction between a sale carried out by virtue of a mortgage and a sale in the execution of a judgment debt. With respect, I can find no merit in this ground of appeal.

I will deal first with the question of the jurisdiction of Farrell, J., under O. 17, r. 10. Order 17, r. 10 (1) states:

- “10. (1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit from the stage at which his predecessor left it.”

“Suit” is defined in s. 2 of the Civil Procedure Act (Cap. 5). The following extract from the judgment of Briggs, J., in the case of *Mansion House Ltd. v. Wilkinson*, explains the meaning of this definition ((1954), 21 E.A.C.A. at p. 101):

“In s. 2 of the Ordinance ‘suit’ is defined to mean ‘all civil proceedings commenced in any manner prescribed’. One might imagine that this would mean ‘prescribed by any written law’: but it does not, for ‘prescribed’ is again defined by the same section to mean ‘prescribed by rules’ and ‘rules’ are defined to mean ‘rules and forms made by the Rules Committee to regulate the procedure of courts’. The Rules Committee is clearly that created by s. 81 of the Ordinance. Accordingly a ‘suit’ is any civil proceeding commenced in any manner prescribed by rules and forms made by the Rules Committee to regulate the procedure of courts under s. 81 of the Ordinance.”

I am of the view that the proceedings in this case are a “suit” within the meaning of O. 17, r. 10, but in any event by virtue of s. 89 of the Civil Procedure Act the provisions of this rule would apply.

The use of the power given by r. 10 is a matter in the discretion of the trial judge. I am of the view that Farrell, J., in his ruling clearly and correctly set out the principles which should guide the court on an application of this nature. He said:

“There appears to be no authority on the application of the rule, but it seems to me that the proper test is whether the successor judge is in as good a position as his predecessor would have been in to evaluate the evidence and submissions which have already been put forward and to continue the hearing on that basis. I am satisfied that such is the position here. No complaint has been made as to the record of the submissions put forward on behalf of the applicant and I agree with counsel for the decree-holder that the evidence of Mr. Lee Browne is not such as to require in the interests of justice that it should be reheard.”

I am of the opinion that Farrell, J., had jurisdiction to continue with the hearing of this application from the stage to which his predecessor, Miles, J., had left it, and that he correctly considered the evidence given by Mr. Lee Browne in arriving at his decision.

The second question concerns the powers of the deputy registrar of the High Court with reference to orders for the attachment and sale of property in execution of a decree. The general power to order the execution of a decree is given to the court by s. 38 of the Civil Procedure Act. Section 44 defines the property liable to attachment and sale in execution of a decree. The method of and procedure for execution is set out in the Civil Procedure (Revised) Rules 1948. Section 81 of the Act is the section giving authority to make these rules, and under sub-s. (2) (1) provision may be made for the delegation to the registrar or other official of the court of any judicial, quasi-judicial or non-judicial duty.

Order 48 of the rules deals with the special powers of the registrar. Registrar includes a district or deputy registrar. Rules 3 and 4 are the relevant rules in this case:

- “3. Formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in execution of a decree of the Supreme Court may be made by the registrar or, in a subordinate court, by an executive officer generally or specially thereunto empowered by the Chief Justice by writing under his hand, but in the event of any objection being taken to the proceedings thereunder, all further proceedings shall be before a judge. Such objection shall be taken by motion on notice.

4. For the purposes of rr. 2 and 3 a registrar or, in a subordinate court, an executive officer empowered as aforesaid, shall be deemed to be a civil court.”

In his memorandum of appeal Mr. Mandavia questions the powers of the deputy registrar to order the sale of property under O. 21, r. 59, but in the court below the issue was as to the power of the deputy registrar to act under r. 61 and the original order for sale was not attacked. I doubt whether the legality of the original order for sale could properly be the subject of an application under O. 21, r. 79 which only gives the court power to set aside the sale on the ground of a material irregularity or fraud in the publication or conduct of the sale, although it is possible that an incorrect order under r. 61, following on an order for sale, may be a material irregularity in the conduct of the sale. The original order for sale does not form a part of the record of the appeal.

Farrell, J., has clearly set out the facts in his decision and these facts have not been questioned in this appeal. I will quote from his judgment at length as I think this is necessary in order to understand the position which would apply both to this ground of appeal and to the ground of appeal against the refusal to grant the application and set aside the sales, Farrell, J., said:

“The facts material to the present proceedings are that an order was duly made for the sale of three out of nine properties of the judgment-debtor attached in this suit. I shall for convenience refer to the three properties, as the Parklands, Salisbury Road and Belfield Road properties. In pursuance or purported pursuance of O. 21, r. 61 (2) of the Civil Procedure (Revised) Rules 1948, the advocates of the decree-holder and the judgment-debtor were summoned before the deputy registrar for settling the public notice of the intended sales. The so called notification of sale was settled in the presence of the respective advocates on June 24, 1966. At this meeting the terms and conditions of sale were settled by consent, and the date of sale was fixed for August 15. A notification of sale was issued over the signature of the deputy registrar on July 8. In the schedule the properties were identified by land reference and were specified to be sold ‘together with all buildings and improvements thereon’. On July 30, the date of sale was amended by consent to September 15, in order to comply with O. 21, r. 62, other terms and conditions remaining as before. A fresh notification of sale giving effect to this amendment was issued on August 4. An advertisement had in the meanwhile been inserted by the court broker in the East African Standard dated July 20 pursuant to condition 8 of the agreed-conditions, namely, that the amount to be expended on advertising should not exceed Shs. 800/-, but the advertisement should otherwise be in the court broker’s discretion. The advertisement identified the properties and in respect of each, gave particulars of one dwelling-house specifying the number of rooms and stating that the rooms were let to individual tenants. It was expressly stated that no warranty was given as to the correctness of the details, which intending purchasers were advised to verify prior to the sale.

On August 15 the registrar received a telegram despatched by the judgment-debtor from Bombay, in which he complained that the advertisement had misdescribed the number of buildings on the plots and that particulars of ‘huge’ monthly ‘incomes’ and ‘large areas’ had been suppressed. On receipt of this telegram the deputy registrar summoned the advocates before him on August 11, and invited their comments on the telegram. Counsel for the decree-holder had no objection to additional particulars being inserted in further advertisements. Counsel for the judgment-debtor indicated that he would require to take further instructions. The deputy

registrar authorised the court broker to spend a further Shs. 400/- on advertising and directed him to insert further particulars in respect of the properties provided such particulars were supplied by the defendant's advocate within one week. No particulars were in fact supplied and the matter thereupon took its course. A further advertisement was published on August 26 identical with the earlier one and a further cable of protest was addressed by the judgment-debtor to the registrar on September 13.

The sale took place as advertised on September 15, and the three properties were knocked down to different purchasers on bids of Shs. 58,000/-, Shs. 47,000/- and Shs. 38,000/- respectively. The purchase price of the Parklands property was duly forthcoming but the purchaser of the Salisbury Road property refused to sign a memorandum of agreement and defaulted in payment of the deposit, while the purchaser of the Belfield Road property paid the deposit by cheque which was subsequently dishonoured, notice of dishonour being given on September 21.

It accordingly became necessary to hold a resale of the remaining two properties. A further advertisement was published on September 20 in respect of these two properties, announcing a sale on September 30, and on that date the two properties were knocked down for Shs. 36,000/- and Shs. 25,000/- respectively."

I am of the view that the validity of the original order of sale of these properties is not the subject of these proceedings and in any case, it does appear from the affidavit of the appellant that this order was made by Miles, J. In any event, in my opinion, the words "formal order for the attachment and sale of property" would empower the registrar to order a sale in a case like this where the order is made by consent and without objection.

The question does arise though as to whether the registrar had any power to act under r. 61. Rule 61 states:

- "61. (1) Where any property is ordered to be sold by public auction in execution of a decree, the court shall cause public notice and advertisement of the intended sale to be given in such manner as the court may direct.
- (2) Such public notice shall be drawn up after notice to the decree-holder and the judgment-debtor, and shall state the time and place of sale, and specify as fairly and accurately as possible –
- (a) the property to be sold;
 - (b) any incumbrance to which the property is liable;
 - (c) the amount for the recovery of which the sale is ordered; and
 - (d) every other thing which the court considers material for a purchaser to know in order to judge of the nature and value of the property.
- (3) Every application for an order for sale under this rule shall be accompanied by a statement signed in the manner hereinbefore prescribed for the signing of pleadings and containing, so far as they are known to or can be ascertained by the person so signing, the matters required by sub-rule (2) to be specified in the public notice.
- (4) For the purpose of ascertaining the matters to be specified in the public notice, the court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.
- (5) The costs of advertising a sale shall be deemed to be costs of the sale."

Rules 59 and 60 are also relevant and these provide as follows:

- “59. Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.
- 60. Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint in this behalf, and shall be made by public auction in manner prescribed.”

It is my view that the words “formal order for the attachment and sale of property may be made by the Registrar” in O. 48, r. 3 must mean that the registrar has to actually consider the application before him and then make the necessary orders to effect the attachment or sale. Formal order here does not mean that the registrar has only to prepare and issue a formal order which has in fact been already made by a judge, as for instance whether he draws up and signs a decree after judgment or as in this case an order after the judge has decided an application. In such cases, the registrar does not “make” the order, he only prepares the order already “made” by the judge. Rule 3 must empower the registrar to consider the proceedings before him and then in his discretion himself make an order. In a sense this will usually only be a formal order as a judgment has already been obtained and, if not settled, execution against the judgment-debtor’s property will follow as a matter of course without dispute, and the rule goes on to make it clear that if any dispute does arise, then on objection being taken in the manner provided, the matter will be taken over and dealt with by a judge. Order 48, r. 4 provides that for the purpose rr. 2 and 3 the registrar shall be deemed to be a civil court, so that in effect a registrar sitting to deal with applications or proceedings under r. 3 would be the presiding officer of a civil court, and a civil court here must mean a tribunal where civil issues are settled and not just a body that is only going to put into formal phraseology an order already made on an issue tried and disposed of by a judge. Form No. 27 in Appendix D of this Schedule to the rules sets out the form of the notification of sale under r. 61 and this does provide for signature by “judge” but in this connection it is to be noted that judge is defined in s. 2 of the Civil Procedure Act as meaning “the presiding officer of a civil court” and this would include the deputy registrar when he is acting under the provisions of O. 48, r. 3.

The further point here is whether “formal orders for attachment and sale of property” would include other incidental orders arising on proceedings necessary to secure the attachment and the sale of property such as an order under r. 61. In his decision the learned trial judge relied on the proviso in r. 3 which states “but in the event of any objection being taken to the proceedings therein” and held:

- “... It is clear that O. 48, r. 3 confers on a registrar not merely the power to make formal orders for attachment and sale, but also to conduct ‘proceedings thereunder’, at any rate until some formal objection is taken by motion on notice whereupon all further proceedings are to be before a judge ...”

I agree that this must be the position here. The intention of this rule is to allow the registrar to conduct the necessary proceedings, and issue the appropriate directions and orders so as to carry out an execution by way of attachment and sale of property, provided that the proceedings are not contested. I am, therefore, of the opinion that the expression “formal orders for attachment and sale of property” include not only the actual orders for the attachment and sale but any other consequential orders which are necessary to effect this purpose and this includes an order made under r. 61.

The only remaining question is that raised as to the merits of the actual decision on the application and it is submitted that the judge should have granted the applications to set aside the sale of these three properties. The two applications made in this case were taken together and were both made under the provisions of O. 21, r. 79 which I have set out.

I have already summarized the grounds for the applications. Farrell, J., held that the appellant had failed to establish any material irregularities. The issues raised by the appellant on this question are set out in ground 4 of his memorandum of appeal. This ground is somewhat involved, but apparently the appellant complains of the following irregularities:

1. that the advertisement appearing in the newspaper of August 26, 1966 in respect of Lot 1 at Parklands and of Lot 2 at Salisbury Road was incorrect as it only described a single dwelling instead of two dwelling houses on each plot of land.
2. That the auctioneer at the sale failed to require the twenty-five per cent. deposit of the purchase money in current coin of the country on the “fall” of the hammer.
3. That the second sale of plots 2 and 3 was held without any further order or direction of the court.

The appellant only argued the first of these three issues and would appear to have abandoned his appeal on the second and third issues. The learned judge in his decision dealt very fully and, in my view, correctly with the questions raised in both these 2 and 3 issues. It does appear from the established facts that the auctioneer did require the purchasers to sign the contract and make the deposit immediately after the sale, in one case the purchaser left without doing so, and in the other the purchaser paid by a cheque on which payment was stopped. In any event both these sales fell through because the deposit was not made and the judge held that r. 73 (1) applied here and not r. 63 (2). He dealt with the meaning of the word “forthwith” in the passage occurring in r. 73 (1):

“... In default of such deposit, the property shall *forthwith be resold*.”

and he held that “forthwith”, in the context of this rule, meant within “a reasonable time” and that the re-sale in this case did take place within a reasonable time thereafter, and therefore in accordance with the provisions of r. 73 (1).

The only remaining question therefore was the validity of the advertisement. Rule 61 clearly differentiates between a public notice and an advertisement and the particulars required by para. (2) of r. 61 are only required to be inserted in the public notice. It is to be noted that the public notice is referred to in the rules both in the marginal note and in the prescribed form, form 27 in Appendix D, as a “notification of sale”. The judge found that the notification of sale in this case contained all the necessary information and that no material irregularity occurred in this respect. The notification of sale was not included in the record of appeal but the judge’s finding has not been questioned in this Court. Rule 61 only provides that there shall be an advertisement of the intended sale given in such manner as the court may direct. The rules do not state how the advertisement should be effected or what it should contain. This is left entirely to the court’s discretion. In his decision the judge referred to the apparent procedure in similar cases. He said:

“... In Kenya the dominant instrument is the public notice as in India it is the proclamation and it is the public notice which is required to state the matters specified in sub-rule (2). The advertisement is an additional mode of publicity, which so far as the rules go, is undefined in form and in practice is left to the discretion of the court broker, who has an

interest in obtaining as good a price as possible for the property to be sold . . .”

This practice appears to have been followed in this case and two advertisements appeared in the East African Standard first on July 20, 1966, and then when the sale was postponed another advertisement, the subject of the complaint on this appeal, on August 26, 1966. This second advertisement was not however left wholly to the discretion of the court’s broker as in between both advertisements, one of the appellant’s protest cables had been received, and as a result the deputy registrar again dealt with the matter in the presence of both the appellant’s advocate and the respondent’s advocate and a representative of Messrs. Muter and Oswald Ltd., the court brokers. As a result the Deputy Registrar ordered that the court broker should insert such further particulars as the appellant’s advocate would supply him within one week and he authorized an additional expenditure of sum Shs. 400/- over and above the Shs. 800/- already authorized. The appellant’s advocate failed to supply any further particulars and the advertisement was accordingly again inserted on August 26, 1966, in the same form as before. In these circumstances it is difficult to see how the appellant can now complain when the advertisement in its present form would be entirely due to the neglect of his advocates or of himself. In any event an advertisement of this sort cannot state fully details of the property being sold and this fact is made clear in the advertisement. Admittedly the advertisement could have stated fuller details but it was not in my view misleading and the appellant has certainly not shown that he has suffered any loss or injury as a result.

I can find no merit on this ground of appeal and in my view the judge was justified on the evidence before him in finding that there had been no material irregularity in the publishing and conducting of the sale of these properties. Having come to this decision the learned judge did not find it necessary to make a positive finding as to whether the appellant had sustained any substantial injury by reason of any irregularity or fraud, but he was clearly of the view, that in any event, especially having regard to the evidence of Mr. Lee Browne, the appellant had not proved that he had suffered any substantial injury. I entirely agree with this view.

I would dismiss this appeal with costs and I would allow the respondent a certificate for two advocates.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Duffus, J.A., and I agree that the appeal should be dismissed. I find it unnecessary to come to a conclusion on whether these proceedings were a suit since in my view the provisions of O. 17, r. 10, would in any event apply having regard to s. 89 of the Civil Procedure Act.

I agree with Duffus, J.A., that Farrell, J., set out correctly the principles which should guide the court in the exercise of its discretion and that there is no reason to interfere with the exercise of his discretion.

There will be an order in the terms proposed by Duffus, J.A.

Spry JA: I have had the advantage of reading in draft the judgment of Duffus, J.A., with which I am substantially in agreement and I shall not repeat what he has said.

There are only two points on which I would, with respect, differ from him. First, there is the question whether an application under O. 21, r. 79 of the Civil Procedure (Revised) Rules 1948, founds a suit for the purposes of O. 17, r. 10. In my view, it does not. I appreciate that the definition of “suit” in s. 2 of the Civil Procedure Act is expressed in very wide terms:

“‘Suit’ shall mean all civil proceedings commenced in any manner prescribed”,

but when the Act is read as a whole, I think it becomes clear that there are civil proceedings which are not to be regarded as suits, even though initiated under the Rules. I think that such proceedings would include proceedings which arise out of a suit which has been determined, that is to say execution proceedings. These are proceedings that lead to orders and not to decrees. I think some support for this view is to be found in the definition of “decree” and “order” and in s. 77, and I do not think it conflicts with the decisions of this Court in *Mansion House Ltd. v. Wilkinson* ((1954), 21 E.A.C.A. 98) or *Bhagat Singh v. Ramanlal Chauhan* ((1956), 23 E.A.C.A. 178), in which the definition of “suit” was considered in relation to quite different questions. However, this would make no difference to the outcome of the appeal, because if the proceedings before the judge were not a suit, s. 89 permitted him to follow the procedure laid down for suits and hence to invoke O. 17. r. 10.

As regards the second ground of appeal, I confess that I find some difficulty in understanding the effect of O. 48, r. 3. Mr. Mandavia stressed the importance of the opening words “Formal orders . . .” and he argued that the power given to the registrar is merely that of putting into formal shape orders already made by a judge. He suggested that the position was analogous to that when the registrar signs a decree. Although this argument is not unattractive, I think its weakness lies in the fact that no-where in the Rules, so far as I am aware, is there any requirement that an order made by a judge be perfected by a formal order. It would, I think, be absurd to suppose that O. 48, r. 3 itself creates the need for such an order. However, I find it unnecessary to decide this since, as Duffus, J.A., has said, the actual order for sale does not form part of the record nor was it attacked in the High Court.

It is also far from clear what is meant by the later reference in that rule to “proceedings thereunder”. The learned judge held that this had the effect of conferring on the registrar the power to conduct proceedings arising out of an order for attachment and sale. With respect, I would not entirely agree, because I do not think the reference to subsequent proceedings can, by itself, amount to a conferring of power. To my mind, it must refer back to r. 1, which empowers the registrar to do ministerial acts and I think that the acts of the registrar that are complained of, the settling of the conditions of sale and so on, as long as they were non-controversial, could properly be described as ministerial. Either party could, under r. 3, have required those proceedings to be taken by a judge but in fact no objection was taken by the advocate then appearing for Mr. Mandavia.

In all other respects, I agree with the judgment of Duffus, J.A., and with the order he proposes.

Appeal dismissed.

The appellant in person.

For the respondent:

JM Nazareth, QC and JK Winayak

JK Winayak & Co, Nairobi

Magon v Ottoman Bank
[1968] 1 EA 156 (CAN)

Division: Court of Appeal at Nairobi

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Date of judgment: 11 December 1967
Case Number: 36/1967 (17/68)
Before: Sir Clement de Lestang V-P, Duffus and Spry JJA
Sourced by: LawAfrica
Appeal from: High Court of Kenya – Mosdell, J

[1] *Evidence – Letter – Receipt of registered letter – Effect of notification by Post Office to addressee – Presumption displaced by evidence of actual receipt – Evidence Act, s. 119 (K.).*

[2] *Practice – Ex parte judgment – Setting aside – Whether conditions may be imposed where judgment is irregular – Time for filing defence extended by consent – Civil Procedure (Revised) Rules 1948, O. 9, r. 10, (K.).*

[3] *Practice – Letter – Receipt of registered letter – Whether date of receipt is actual date received or date when letter might actually have been collected from the Post Office.*

Editor’s Summary

In the High Court, Nairobi, an *ex parte* judgment was set aside under O. 9, r. 10 of the Civil Procedure (Revised) Rules 1948, on terms that (a) the principal sum claimed be paid into Court within a specified time, (b) costs to the date of the setting aside of the judgment be paid within a specified time, and (c) a bond with securities for the sum of Shs. 2,000/- be entered into. If the conditions were not fulfilled the judgment was to stand. On appeal the question for consideration was whether the trial judge was entitled to impose such conditions. The facts were that the advocates for the respondent bank sent a registered letter dated February 28, 1967, to the appellant stating that if the appellant’s defence in the suit was not filed within ten days from the receipt of the letter, the respondent bank would apply for judgment in default.

On March 20, 1967, the respondent bank was granted judgment in default. It was contended by the respondent bank that the appellant received or ought to have received the registered letter of February 28, 1967 on or about March 1, 1967, or on March 9, 1967, or a reasonable time thereafter. The appellant deposed by affidavit that the letter was not received until March 16, 1967, although it appears that the Post Office issued a certificate of the arrival of the registered letter to the appellant on March 1, 1967, and a reminder of its arrival to the appellant on March 9, 1967, by placing both the original certificate and the reminder in the appellant’s post box. The letter was delivered to the appellant against the reminder on March 16, 1967.

Held –

- (i) as it was found as a fact that the letter was not received until March 16, 1967, therefore the time for filing defence had not expired by March 20, and the *ex parte* judgment should be set aside *ex debito justitiae*;
- (ii) since the obtaining of judgment was irregular, O. 9, r. 10 did not apply and condition (a) that the principal sum be paid into court within a specified time and (c) that a bond be executed should be struck out.

(iii) as to condition (*b*) relating to costs, this order should be varied to read “costs to be costs in the cause”.

Appeal allowed (and cross-appeal dismissed) with costs of both appeal and cross-appeal to the appellant.

No cases referred to in judgment

December 11, 1967. The following considered judgments were read:

Judgment

Duffus JA: The plaintiff/respondent, a commercial banking company, obtained an *ex parte* judgment against the first defendant/appellant, by reason of his default in filing a defence. The appellant applied to set aside the judgment under the provisions of O. 9, r. 10 of the Civil Procedure (Revised) Rules 1948. He based his application on the fact that the respondent's advocates had by their letter dated February 28, 1967, extended the time within which to file the defence to ten days from the receipt of their letter, and that this letter was only received by the appellant on March 16, 1967, so that the time within which to file the defence had not yet expired when the respondent applied for, and obtained the *ex parte* judgment on March 20, 1967. The appellant claimed to be entitled to have the judgment set aside *ex debito justitiae*. The appellant obtained the order to set aside the judgment but this was only granted on terms. The terms were that the judgment was only to be set aside if the appellant:

- (i) paid the principal sum claimed into court within fourteen days;
- (ii) paid the respondent all the costs thrown away to date, such costs to be taxed and then paid within fourteen days; and
- (iii) entered into a bond with sureties to be approved by the registrar in the sum of Shs. 2,000/- also within the same period. If these conditions were not carried out within the stated time the judgment stood.

The appellant appealed to this Court against the imposition of these conditions. There is a cross-appeal against the finding that the judgment was irregularly obtained, and submitting that the judge should have held that the appellant had not shown a *prima facie* defence on the merits and accordingly have dismissed the application. The cross-appeal also claimed that the judge erred in fact in not holding that the appellant received or ought to have received the letter of February 28, 1967 on March 1, 1967, or on March 9, 1967 or within a reasonable time thereafter.

Order 9, r. 10 reads as follows:

- "10. Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under O. 48, r. 2, it shall be lawful for the court to set aside or vary such judgment upon such terms as may be just."

The first question that arises is whether this judgment was regularly obtained or not. This depends on whether the extension of time within which to file the defence, as granted by the letter of February 28, 1967, had expired or not. There can be no doubt that this extension of time was a valid extension binding on the respondent; O. 49, r. 6 applies. The actual extension was given by the last paragraph of the letter of February 28, 1967 and this stated:

- "If your defence is not filed within ten days from the receipt of this letter we shall apply for judgment in default."

It is clear from the terms of this extension that the ten days started to run as from the receipt of the letter by the appellant. It has been established that this letter was sent by registered post to the appellant on February 28, 1967, and by virtue of s. 119 of our Evidence Act, the court may presume that this letter was received by the appellant in due course, but the evidence in this case has established, and the learned judge has accepted, that this letter was actually received by the appellant on March 16, 1967. This fact was established both by the appellant's affidavit and by the affidavit of counsel for the respondent.

Counsel for the respondent averred that information received from the post office shews that the notification that this letter was in the post office was first issued on

March 1, 1967, and then a reminder was sent on March 9, 1967 and the letter was delivered to the appellant against the reminder on March 16, 1967. It has therefore been definitely established that the appellant did not receive the letter until March 16, 1967, and the question is whether or not his receipt of this letter can be deemed to have taken place on the day that he received the notification of the registered letter or within a reasonable time after that notification was first placed in his letter box at his post office. Learned counsel for the respondent was unable to refer to any authority that would assist his case on this point. The appellant did in his letter of November 25, 1966, which was the letter to which the respondent's advocates replied on February 28, 1967, ask for a reply by post. A reply would ordinarily have been sent by letter to the post box number that he gave in his letter, but the reply was in this instance sent by registered post, and not by ordinary letter post, so that all that the appellant would receive in his letter box was a notification to the effect that there was a registered letter in the post office, which he would then have to sign for and collect in the usual way. I cannot see how this notification could possibly be deemed to be the receipt of the letter. Receipt here must mean that the appellant actually received the letter so that he would be in a position to read the same and to know the contents. In any event, the appellant has stated in his affidavit that he never received the notification from the post office until March 15 and as the learned judge points out there is no evidence to contradict this statement. The judge had no alternative but to accept this as a fact.

The learned judge was therefore, in my view, correct in finding that the appellant received this letter on March 16, 1967 and that therefore the time for filing his defence had not yet expired, and that accordingly the *ex parte* judgment was irregularly entered.

This being so the appellant was entitled, as the judge states, to have the judgment set aside *ex debito justitiae*. Rule 10, by virtue of which the judgment has been set aside, does give the court a discretion to set aside the judgment upon such terms as may be just, but in a case like this where the obtaining of the judgment was irregular and not in accordance with the law and practice as laid down in our Civil Procedure Rules, the appellant is clearly entitled as of right to have the judgment set aside without any conditions being imposed. This is a case in which the court would, in my view, have had power to act under its inherent jurisdiction if the specific provisions of O. 9, r. 10 did not apply. I understood counsel for the respondent to concede that if the judgment had been irregularly obtained, then the imposition of terms, except on the question of costs, could not be justified. I would therefore set aside the terms imposed requiring a deposit of money and ordering a bond to be entered into. Counsel for the respondent however asked for an order that the costs of the application be costs in the cause. There is considerable merit in his application. It is clear that the learned judge in imposing the conditions on the appellant did so because he felt, with what appears to have been with considerable justification, that the appellant had no real defence to the action and had only employed delaying tactics so as to evade judgment, and further that the appellant, when he received the registered letter dated and posted on February 28, on March 16, should have realized that there had been considerable delay in the post office and have taken immediate steps to ensure that judgment was not entered against him, and that he was therefore dilatory in not taking any action until March 20, the date on which judgment was entered against him.

The judge was not, however, justified in awarding the respondent his costs up to the date of the judgment. The irregular entering of the judgment was the respondent's fault and usually he should have been ordered to pay the appellant's costs in having the judgment set aside. In the circumstances of this case, however, I am of the view that the learned judge would have been justified in ordering

that the costs of the application be costs in the cause so that in the final result the successful party would have these costs: this order would appear to be the most equitable one in the circumstances.

I would therefore allow this appeal and order that that part of the High Court's order imposing terms as a condition of the setting aside of the judgment be deleted, and that the judgment be set aside unconditionally, and further that the costs of the application be costs in the cause.

I would dismiss the cross-appeal, and allow the appellant the costs of the appeal and of the cross-appeal. I agree with the order set out by the learned Vice-President in his judgment.

Spry JA: I have had the advantage of reading in draft the judgment of Duffus, J.A., with which I am in entire agreement and I would only add a few words.

The appellant wrote to the respondent company on November 25, 1966, asking for certain particulars, and ended his letter by saying that a defence and counterclaim would be filed within ten days of receipt of those particulars, adding the words "please confirm". The advocates for the respondent company replied on February 28, 1967, ending their letter with the words "If your defence is not filed within ten days from the receipt of this letter we shall apply for judgment in default". It seems to me that that exchange clearly amounts to an agreement to extend the time for filing the defence, as permitted by O. 49, r. 6.

It was proved by affidavit evidence and not denied that the letter of February 28, 1967, was actually received on March 16, 1967. *Ex parte* judgment was obtained on March 21, 1967, that is, within ten days from March 16, 1967. Therefore, *prima facie*, the judgment was irregular.

The letter of February 28, 1967, was sent by registered post and it is common knowledge that when a registered letter is sent to the holder of a Post Office box, the practice is for a slip to be placed in that box notifying the holder that the letter awaits collection. The advocate for the respondent company by affidavit testified to his belief that the appellant had received the notification slip relating to the letter in question on or about March 1, 1967. His belief was based on information he had received from the Head Postmaster, which, being hearsay, was not, of course, evidence. In any case, it was not really material. What matters is that there was no evidence whatever to show when the notification slip was placed in the appellant's box or that he ever received it. The appellant testified in his affidavit that he never received the original notification slip and only received a reminder on March 15, 1967, and there is no evidence to rebut this.

Counsel for the respondent company asked us to say that the appellant should be deemed to have received the letter on or about March 1, 1967, but with respect I can see no ground on which we could do so. If there had been evidence that the appellant, by his action or inaction, had prevented the letter from reaching him, it may be that the court would have been entitled to treat him as having received it, so that he should not profit by his own wrong, but there is no such evidence and the question does not arise.

Order 9, r. 10 allows the court to set aside a judgment "upon such terms as may be just". In the present case, however, the court had no power to pass judgment, since the time for filing a defence had not expired. In my opinion, where a court passes judgment when it has no jurisdiction to do so, the person against whom the judgment is passed is entitled as of right to have it set aside and no conditions can therefore properly be imposed. I think, therefore, that the appeal must succeed.

As regards the counterclaim and on the question of costs in the High Court I likewise agree with the judgment of Duffus, J.A.

Sir Clement De Lestang V-P: I have had the advantage of reading in draft the judgments of Duffus and Spry, JJ.A., and I agree with their conclusions. For the reasons which they have given I agree that the default judgment was irregularly obtained. Although O. 9, r. 10 is couched in wide language it is a moot point whether it is not designed to apply only to judgments regularly obtained but as this point was not argued I do not propose to decide it. Nor is it necessary to do so since the power to set aside in a case like the present stems clearly from the court's inherent jurisdiction.

The appeal is allowed, the order of the court below is set aside and an order granting unconditional leave to defend and ordering that the costs of the application be costs in the cause is substituted therefor. The cross-appeal is dismissed. The appellant will have the costs of the appeal and of the cross-appeal which should be taxed as one bill of costs.

Order accordingly.

For the appellant:

SS Mandla

SS Mandla, Nairobi

For the respondent:

WE Rawson-Shaw

Hamilton, Harrison & Mathews, Nairobi

Habib Punja and Sons v Agas
[1968] 1 EA 160 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	5 October 1967
Case Number:	15/1967 (24/68)
Before:	Biron J
Sourced by:	LawAfrica

[1] *Landlord and tenant – Option to renew lease – Whether exercise of option creates new tenancy or continues old one.*

[2] *Rent Restriction – Standard rent – Option to renew at higher rent exercised before prescribed date – Rent Restriction Act, s. 4 (1), proviso (i) (T.).*

[3] *Standard rent – Progressive rent – Meaning of “progressive rent” – Rent Restriction Act, s. 4 (1), proviso (ii) (T.).*

Editor's Summary

The appellants let commercial premises to the respondent by a lease drawn in March, 1963, for a period of three years from April 1, 1963 at a monthly rental of Shs. 2,400/-. There was an option to renew for a further period of three years at a rental of Shs. 3,000/- per month provided notice of the exercise of the option to renew was given in writing three months before the date of the expiry of the term granted. The option was duly exercised and the respondent remained in occupation of the premises. On April 1, 1967, the respondent applied to the Rent Tribunal for determination of the standard rent, and the tribunal determined such standard rent to be Shs. 2,400/- per month. In accordance with s. 4 (1) of the Rent Restriction Act 1962 as amended in 1967, the standard rent is the rent at which the suit premises were let on the prescribed date (which was January 1, 1965) unless the facts came within two provisoes to the said section, namely:

- “(i) in the case of any premises let under an agreement or lease entered into before the prescribed date in which there is a provision for any increase

of rent during the term of the agreement or lease after the prescribed date the maximum rent payable under such agreement or lease after taking into account all such increases of rent shall be the standard rent;

- (ii) in the case of any premises let at a progressive rent payable under any agreement or lease entered into before the prescribed date the maximum rent payable under such agreement or lease shall be the standard rent.”

On appeal by the appellants to the High Court, it was argued that the standard rent was Shs. 3,000/- being a progressive rent within the meaning of proviso (ii) or in the alternative the rent of Shs. 3,000/- per month came under the terms of proviso (i) and was the standard rent.

Held – the standard rent was correctly determined to be Shs. 2,400/- because:

- (i) the exercise of the option, on its wording, gave rise to a new tenancy after the prescribed date; proviso (i) therefore did not apply;
- (ii) there was no progressive rent under a single tenancy but an increased rent introduced by virtue of the new tenancy after the prescribed date, and proviso (ii) therefore did not apply.

Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Bryanston Properties Co. Ltd. v. Edwards*, [1943] 2 All E.R. 646.
- (2) *Tedman v. Whicker*, [1944] 1 All E.R. 26.
- (3) *Wheeler v. Wirral Estates Ltd.*, [1935] 1 K.B. 294.
- (4) *Clark v. Mead* (1933), 149 L.T. 308.

Judgment

Biron J: This is an appeal from the determination by the rent tribunal sitting at Dar-es-Salaam determining the standard rent of the suit premises at Shs. 2,400/- per month.

The facts are not in dispute. The only evidence adduced before the tribunal was the lease, and the case fell to be determined on the construction of the relevant provisions of the Rent Restriction Act 1962 as re-enacted in 1967 (hereinafter referred to as the Act), and, I should add, of the lease. The facts are briefly as follows.

By a lease drawn up in March, 1963 the appellant landlord let to the respondent tenant the suit premises at a monthly rental of Shs. 2,400/- for a period of three years commencing as from April 1, 1963. By the lease the tenant was granted an option of renewal for a further term of three years at a rental of Shs. 3,000/- per month provided notice of the exercise of the option to renew was given in writing three months before the date of the expiry of the term granted. The option was duly exercised and the tenant respondent remained in occupation of the premises. On April 1, 1967, the tenant applied to the rent tribunal for the determination of the standard rent, and the tribunal by its determination dated June 20, 1967 duly determined the standard rent at Shs. 2,400/-. It is from this determination that this appeal has been brought.

By s. 4 (1) of the Act:

“The expression ‘standard rent’ in relation to any premises means –

- (a) a rent determined by the tribunal to be the rent at which the premises were let at the prescribed date:

Provided that –

- (i) in the case of any premises let under an agreement or lease entered into before the prescribed date in which there is a

provision for any increase of rent during the term of the agreement or lease after the prescribed date the maximum rent payable under such agreement or lease after taking into account all such increases of rent shall be the standard rent;

- (ii) in the case of any premises let at a progressive rent payable under any agreement or lease entered into before the prescribed date the maximum rent payable under such agreement or lease shall be the standard rent.”

The remainder of the section, which is a lengthy one, is not relevant.

The prescribed date is defined in s. 2 as:

“‘prescribed date’ means, in relation to a dwelling house, the first day of July, 1959, and, in relation to commercial premises, the first day of January, 1965.”

In a nutshell, the plaintiff’s case was that the premises had been let to the tenant at a progressive rent of Shs. 3,000/- per month, which, according to the provisions of the section above set out, is the standard rent. The tenant’s case was that the rent of Shs. 3,000/- was not a progressive rent within the meaning of the section but that it was the rent of a new letting, commencing after the expiry of the original tenancy, that is, as from April 1, 1963. The standard rent was therefore the rent at the prescribed date, that is, January 1, 1965 (as the premises are commercial premises) when the rent was Shs. 2,400/- per month.

In arguing this appeal, counsel for the appellant maintained that the original letting with the option of renewal, which was in fact exercised, constituted one letting, and therefore the premises were let at a progressive rent, the maximum amount being Shs. 3,000/- which, he contended, was the standard rent in accordance with the provisions of the section above set out. Unless I misunderstood him, counsel further contended that even if the second term, which rose as a result of the exercise of the option of renewal, could not be said to be a continuation of the original letting but a separate one, even so the standard rent was Shs. 3,000/-, calling in aid the second part of the proviso to the section. Counsel relied for his submissions on two English cases, that of *Bryanston Properties Co. Ltd. v. Edwards* ([1943] 2 All E.R. 646), and *Tedman v. Whicker* ([1944] 1 All E.R. 26). The facts of the first case, as set out in the headnote were that:

“An agreement for a quarterly tenancy provided for payment of a rent of £275 per annum payable quarterly in advance, but that, so long as the war between Great Britain and Germany continued, the lessee could deduct the sum of £85 per annum from the rent, such deductions to be made by equal quarterly amounts. The effect of that was to reduce the rent payable to £190 per annum. On June 24, 1942, notice to quit was given by the landlords and that notice expired on September 29, 1942. The respondent held over as statutory tenant and in November, 1942, the landlords served a notice to increase the rent to £275, the increase to take effect on December 25, 1942. It was contended for the tenant that (i) the standard rent was the lower figure of £190 or, alternatively, (ii) the provision for a reduction in the rent was a term of the contractual tenancy which by the Rent Acts was incorporated in the statutory tenancy as a term thereof.”

And the court held:

- “(i) on the true construction of the agreement the standard rent was £275.
- (ii) the provision whereby the lessee could satisfy his obligation by paying a lower rent was a term of the tenancy and accordingly his right to

make the deduction from the standard rent under the statutory tenancy was maintained and preserved.

- (iii) semble: a progressive rent can be a rent which is increased in one step only and that increase may take effect at a time which is uncertain, as, for example, at the end of the war.”

The facts of the other case relied on were similar, except that in that case the lease was worded conversely so that the rent was at a reduced figure during the continuation of hostilities. To my mind, all that the two cases, the latter, incidentally, following the former, laid down, was that a rent is still termed a progressive rent although it only progressed by one stage, the court in both cases remarking that the expression “progressive rent” was not a term of art. It may also be said that these cases are authority for the proposition that even if the increase in the rent is contingent on some event occurring, the rent would still be a progressive rent. I shall revert to this aspect subsequently in this judgment. To my mind, although the two parts of the proviso to the section in the Act above set out are worded differently in that in the first part no mention is made of the term “progressive rent”, both parts of the proviso postulate that the rent which is the criterion for determining the standard rent must be the rent at which the premises are let under the agreement or lease on which the premises are currently held. In other words, to my mind, the crux of this case – in fact the sole issue to be determined – is whether the exercise of the option by the tenant to renew the lease, and her remaining in occupation for a further term of three years, constituted one letting, or the second term was held under another and distinct letting. Counsel for the appellant strongly maintained, and argued with considerable force, that there was one letting which was for a term of six years provided the tenant exercised her option of renewal, which in fact she did.

Counsel for the respondent maintained that on exercising her option of renewal the tenant continued in occupation under a new lease, the rent of which was Shs. 3,000/- and that it was not affected by the old original lease from which it stemmed so as to render the rent, or rather rents, agreed a “progressive rent”. Counsel relied on two authorities, that of Megarry, *The Rent Acts* (9th Edn.), p. 284, wherein at note 36 on the passage:

“The phrase ‘progressive rent’ is not a term of art, and the Acts do not define it, but the meaning established by the courts is ‘a rent under one single tenancy which automatically rises during the continuance of that tenancy’,”

it is stated:

“And not, e.g., only on the exercise of an option to renew the tenancy: see *Wheeler v. Wirral Estates Ltd.* *supra*, at pp. 299, 300”;

and that of 20 Halsbury’s Laws (2nd Edn.), wherein it is stated in note (b) at p. 313:

“A progressive rent is one that automatically rises during the continuance of the tenancy, and so an increase of rent on the grant of a new tenancy is not a progressive rent (*Wheeler v. Wirral Estates Ltd.* ([1935] 1 K.B. 294)).”

It will be noted that both authorities rely on the same case.

With respect to the learned editors of Megarry, the case relied on, to my mind, is not an authority for the proposition that the exercise of an option of renewal creates a new tenancy, at least in so far as to what constitutes a progressive rent. The facts of that case are, quoting from the headnote:

“Premises belonging to the Crown were let to the plaintiff in 1916 at a rent of 9s. 6d. per week, subsequently reduced by the Crown to 7s. 2d. per week. The Rent Restriction Acts did not apply, because those Acts did not affect the Crown. Subsequently, in 1928, the Crown sold the premises to the defendants subject to the plaintiff’s tenancy at the same rent of 7s. 2d. per week. The Acts then applied to the premises except during the continuance of the plaintiff’s original tenancy. In 1929 the defendants gave the plaintiff notice to quit with an alternative, in the same document, of an increase of the rent to 10s. 6d. per week, being the permitted increase on the basis of a standard rent of 9s. 6d., at which rent the premises had been in fact first let to the plaintiff:

Held, that the words ‘first let’ in s. 12, sub-s. (1) (a), of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 meant first let in fact without reference to the Rent Restriction Acts, and that, therefore, the premises were first let in 1916, and the statutory rent was consequently 9s. 6d. per week.

Clark v. Mead ((1933), 149 L.T. 308) overruled.

Held, further, that the rent of the premises after the sale by the Crown, 7s. 2d. and 10s. 6d. per week, was not a ‘progressive rent’ within the meaning of the above section, a progressive rent being a rent under one single tenancy which automatically rises during the continuance of that tenancy. The above rents were payable under different tenancies.”

In my judgment that case does not constitute an authority for the proposition that the exercise of an option of renewal creates a new tenancy, for in that case the first tenancy was formally and legally determined by a proper notice to quit. It is not necessary to quote from the judgment, but sufficient to set out the last paragraph of the headnote quoted, which reads:

“*Held*, further, that the notice to quit was good, there being no reason why the notice terminating the tenancy and the notice to increase the rent should not be on the same piece of paper.”

It will be noted that Halsbury does not deal with the effect of the exercise of an option of renewal.

Counsel for the respondent further submitted that even if the exercise of an option merely extends the original term and there is but one letting, the rent in this instant case could not be termed a progressive rent, as the increase was not automatic but depended on a contingency, that is, the exercise of the option by the tenant. His authority for this was first of all the wording in the two passages cited from Halsbury and Megarry, which both use the expression that the rent rises automatically. As already noted, both Halsbury and Megarry give as authority for their statements the case of *Wheeler v. Wirral Estates Ltd.* ([1935] 1 K.B. 294), and the word “automatically” appears in the headnote to that case as above set out, as it does in the judgment. I must confess that I do not fully comprehend the meaning of “automatically” used in these passages, particularly, as very pertinently pointed out by counsel for the appellant, in the cases of *Bryanston Properties Co. Ltd. v. Edwards* ([1943] 2 All E.R. 646) and *Tedman v. Whicker* ([1944] 1 All E.R. 26), both decided in 1943 (the *Wheeler v. Wirral Estates* case was in 1935), the increase in rent was subject to a contingency. Further, even Megarry himself, in the very passage quoted, which ends with “which automatically rises during the continuance of that tenancy”, continues with “either by reference to fixed and ascertained periods or by reference to the happening of contingencies”. However, in view of what follows I do not feel called upon to decide that particular point. Apart from the statement by Megarry no authority

has been cited, nor am I aware of any, to the effect that the exercise of an option of renewal of a tenancy creates a new tenancy. Megarry is no mean authority and not lightly to be disregarded, but as submitted by counsel for the appellant, his statement cannot bind this Court, and as already noted his proposition is wider than the facts of the case on which he bases it warrant. In the absence of any specific case or authority (other than Megarry) to the point, I propose to decide the issue before the Court on the application of first principles – two principles – the first, the rather trite one that the courts do not make agreements between parties but merely uphold and enforce agreements made by them (unless illegal or for some other good reason); on the application of the second principle that *pacta sunt servanda*, or on the even stronger maxim that *pacta dant legem contractui*. The option clause in the tenancy lease entered into between the two parties is at para. 4 (c), which reads:

“If the lessee shall be desirous of taking a new lease of the demised premises after the expiration of the term hereby granted and of such her desire shall deliver to the lessors or leave for them or send by registered post to them at their last known address in Tanganyika notice in writing not less than three (3) months before the expiration of the said term then the lessors will at or before the expiration of the term hereby granted if there shall then be no subsisting breach of any of the lessee’s obligations under this present demise at the cost of the lessee grant to the lessee a new lease of the premises hereby demised for a further term of three (3) years to commence from and after the expiration of the term hereby granted at the monthly rent of Shillings three thousand (Shs. 3,000/-) but with and subject to the same covenants and conditions as in the present demise reserved and contained this present covenant for renewal excepted.”

Whatever may be the effect in general of the exercise of an option of renewal in a lease, it is abundantly clear, to my mind, from the words used by the parties themselves, on the cardinal canon of construction that words be given their ordinary meaning, that the parties intended that the exercise of the option should give rise to a new tenancy. Therefore, in my judgment, the occupation by the tenant of the premises after the expiration of the old term, that is, as from April 1, 1966, was under a new tenancy or letting, commencing as from that date within the meaning of s. 4 (1) of the Act. The standard rent was therefore, as provided for in the section referred to, the rent at the prescribed date, January 1, 1965, which was Shs. 2,400/-.

I should perhaps add that although in the *Bryanston Properties* case referred to, the original tenancy was in fact determined by a proper notice to quit and the rent of the original tenancy was held to be a progressive rent continuing on the tenant remaining in occupation, the tenant held over as a statutory tenant. A statutory tenancy, which is the creation of the Rent Acts, is in a class by itself, and as expressly provided for is held on the same terms, including the rent, as the original tenancy. Such tenancy cannot therefore be equated with a new tenancy or letting created by the parties themselves.

I have deliberately refrained from ruling on the general effect of the exercise of an option of renewal of a tenancy, despite the authority of Megarry, as, such ruling not being necessary for the purposes of this case, I see no point in attempting to cover a wider and more comprehensive field.

I am fortified in my view on the construction of cl. 4 (c) of the lease in that it differs from that set out in *The Encyclopaedia of Forms and Precedents* (3rd Edn.), Vol. 8, p. 231, which reads:

“That the landlord will on the written request of the tenant made . . . months before the expiration of the term hereby created and if there shall

not at the time of such request be any existing breach or non-observance of any of the covenants on the part of the tenant hereinbefore contained at the expense of the tenant grant to him a lease of the demised premises for the further term of . . . years from the expiration of the said term at the same rent (*or* the yearly rent of £ . .) and containing the like covenants and provisoes as are herein contained with the exception of the present covenant for renewal the tenant on the execution of such renewed lease to execute a counterpart thereof (and to pay to the landlord the sum of £ . . by way of premium).”

The parties would appear to have deliberately gone out of their way to set up a new tenancy on the exercise of the option.

In the circumstances, for the reasons I have attempted to set out, I consider that the appeal should be, as it is, dismissed with costs, and the determination of the rent tribunal is upheld.

Appeal dismissed.

For the appellant:

NA Velji

Sayani, Balsara and Velji, Dar-es-Salaam

For the respondent:

NM Kassam and MS Shukla

George N Houry & Co, Dar-es-Salaam

Machango v Morjaria [1968] 1 EA 166 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	30 September 1967
Case Number:	9/1967 (26/68)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Rent Restriction – Estoppel – Whether statement in application to rent tribunal creates estoppel – Rent Restriction Act, s. 9 (T).*

[2] *Rent Restriction – Standard rent – Sublease at a profit – Rent Restriction Act, ss. 15 and 19 (d) (T).*

Editor’s Summary

Certain commercial premises in the Ilala district of Dar-es-Salaam were let to a tenant in 1954 at a monthly rental of Shs. 1,250/-. In July, 1959, the rent was reduced to Shs. 700/- per month as from August 1, 1959. Under the Rent Restriction Act 1962, the prescribed date for determination of the

standard rent was July 1, 1959, at which date the monthly rental was still Shs. 1,250/-. In 1961, the respondent became the tenant of the premises at Shs. 600/- per month. The respondent sub-let to the appellant at Shs. 1,200/- per month. The appellant paid this rent of Shs. 1,200/- per month until September, 1964, when the respondent raised the rent to Shs. 1,500/- per month, which the appellant paid for four months, i.e., until the end of December, 1964. In September, 1965, the appellant surrendered his sub-tenancy to the landlord. The respondent first filed suit in the district court claiming unpaid rent from the appellant. The respondent's claim later came before the rent tribunal. The tribunal held that the standard rent was Shs. 1,250/- per month, being the rent being paid on the prescribed date, viz., July 1, 1959. The tribunal awarded arrears of rent from January, 1965, to September, 1965, giving credit for rent overpaid for the months October to December, 1964. On appeal to the High Court it was contended that the standard rent was the rent paid by the appellant as the head lessee to the lessor, i.e. Shs. 700/- per month and not

Shs. 1,250/- per month on the grounds that (a) in the application to the tribunal the respondent had alleged that the standard rent was Shs. 700/- per month; or in the alternative (b) the respondent was estopped from alleging that the standard rent was Shs. 1,250/- as proved after taking evidence; (c) the respondent made an unfair profit by renting premises at Shs. 600/- and sub-letting at Shs. 1,200/-.

Held –

- (i) the rent tribunal was not bound by the pleadings;
- (ii) there was no estoppel;
- (iii) the making of a profit is not prohibited by the Rent Restriction Act; provided the standard rent is not exceeded.

Finding of tribunal upheld and appeal dismissed with costs.

Case referred to:

(1) *R. v. Brighton and Area Rent Tribunal*, [1950] 2 K.B. 410; [1950] 1 All E.R. 946.

Judgment

Georges CJ: As was correctly stated by the advocate appearing for the appellant in this matter, this case has had a chequered history. It concerns portion of a building in the Ilala district of Dar-es-Salaam, which was intended for a cinema but, apparently, was never used as one. The portion consists of a bar with living quarters upstairs, and is hereafter referred to as “the suit premises”.

The whole building is owned by a company – the Indo-African Theatres Ltd. In 1954 the suit premises were let to Goverali Abdallah Shariff at a monthly rental of Shs. 1,250/- per month. Shariff was a brother-in-law of one of the directors of the company. He ran a bar on the premises. By 1958 the business seems not to have been flourishing, and in July, 1959 the company agreed to reduce the rent to Shs. 700/- per month as from August 1, 1959.

It should be noted that the Rent Restriction Act which came into force in 1962 provided that the standard rent in relation to premises meant *inter alia* “a rent determined by a board to be the rent at which the premises were let at the prescribed date”. Section 2 (1) of the Act states that “ ‘prescribed date’ means the first day of July, 1959”. On the prescribed date, therefore, the suit premises was let at Shs. 1,250/- a month, though a month later the rent was substantially reduced.

In 1961, the respondent became the tenant of the suit premises. The rent he paid was Shs. 600/- per month. In September, 1962 he sublet the entire suit premises to the appellant at a rent of Shs. 1,200/- per month. In his evidence, the respondent seeks to show that he had improved the premises during the time that he occupied them personally. The appellant denies this. Even if the respondent is believed, the improvements he states that he carried out could not possibly justify the extra Shs. 600/- he charged on the sub-lease. The appellant was, however, content to pay that rent and did pay it until September, 1964, when the respondent asked for Shs. 1,500/- a month. Appellant paid the Shs. 1,500/- for four months until December, 1964, and then stopped because he felt it was too high.

The respondent filed suit No. 545 of 1965 in the district court, dated March 8, 1965, claiming rent for the months of January and February, 1965. The appellant contended that the premises, being occupied

partly for business and partly as a dwelling house, were controlled by the Rent Restriction Act 1962, and that the district court had no jurisdiction. An order was made under s. 7 (1) (a) of the Act staying proceedings pending determination by the Rent board of the issue

as to whether or not the premises were controlled. The board decided that the premises were controlled, and in November, 1965 the senior resident magistrate dismissed the district court case. He had been asked to transfer it to the rent board, but had declined to do so. There was an appeal to the High Court, and there an order was made that the matter be transferred to the rent board.

The application before the board is dated July 27, 1966. The suit premises are described and the rent stated to be Shs. 1,500/- per month. It is stated that the premises were let on July 1, 1959, and that the rent then was Shs. 700/- per month. The relief prayed for was recovery of rent and of mesne profits and costs. The respondent stated that the appellant's tenancy had been determined by a notice dated January 31, 1965, a copy of which was attached to the application. Rent was claimed for the month of January and thereafter mesne profits from February 1, 1965. A claim for possession was also set out, but this was apparently crossed out. In September, 1965, the appellant had surrendered his sub-tenancy directly to the owner of the building, and they had then let it to N.U.T.A., which is now in occupation. The respondent does not seem to have made a fuss about the matter.

At the hearing, the respondent testified that the premises had been let at a rent of Shs. 700/- on the prescribed date, but that up to June, 1959 it had been let at Shs. 1,250/- per month. His first witness was, however, Goverali Abdallah Shariff, who deposed that the rent on July 1, 1959, had been Shs. 1,250/- and that the reduction had taken place from August 1, 1959. A representative of the owners confirmed the position. There was then an adjournment so that books could be produced. The books were examined in the board room of the company and established that the rent for July, 1959 had been Shs. 1,250/-.

The notice, a copy of which had been attached to the application, was never proved.

The appellant contended (as he had in his written statement of defence to the application) that the standard rent was either Shs. 600/-, the rent paid by the respondent to the owner, or Shs. 700/-, the rent stated in the application to have been the rent on the prescribed date. He submitted that he was entitled to a refund on the amount he had paid as rent.

The board held that the standard rent, i.e. the rent at which they determined that the premises had been let on the prescribed date, was Shs. 1,250/-. They held also that since the service of a proper notice had not been proved, they could not find that the tenancy had been terminated. The evidence before them was that the appellant had given up possession of the premises in September, 1965. They awarded arrears of rent from January, 1965 to September, 1965, allowing Shs. 1,000/- for rent overpaid for the months October to December, 1964. From this judgment the appellant has appealed.

The first ground of appeal was that, since the respondent's case was that the standard rent was Shs. 700/- a month, the board erred in finding on the evidence that it was Shs. 1,250/-, counsel for the appellant seemed to treat the application before the board as pleadings and urged that the parties should be confined to their pleadings. He quoted relevant passages from Chitaley's Civil Procedure Code.

With the greatest respect, I think the argument is most ill-founded. Tribunals such as rent boards are set up precisely because the legislature wishes to have issues determined by a body which while judicial in its approach, will not become tied down to procedural formalism.

Section 39 (2) (a) gives the Minister power to make regulations prescribing the manner in which the board shall conduct its business. I am told that no regulations have been made prescribing procedure as such. There are regulations

contained in Government Notice No. 342 of 1962, providing for Forms, Fees and Costs. Though a document has been filed headed “Written Statement of Defence”, there is no authorisation anywhere in the Act for the filing of such a document. No doubt it is a convenient way of defining the issues, but no more. The entire code for the regulation of the proceedings of the board is set out in s. 9.

I agree with the statement made by Lord Goddard, C.J., in *R. v. Brighton and Area Rent Tribunal* with reference to rent tribunals in England, and I think it equally applicable here ([1950] 2 K.B. at p. 419):

“It is obvious, therefore, that Parliament intended that the procedure of these tribunals should be of the most informal nature that is possible to conceive . . . It is quite obvious here that Parliament has said that the ordinary procedure to which lawyers are accustomed shall not apply to these cases. The probable reason is, as the Attorney-General has stated, that it was supposed that the great majority of cases which would come up for determination under this Act would concern small properties – working-class properties and unfurnished lodgings.”

There is no place in such a tribunal for any rigid approach to pleadings. A mere look at the application will show that it is in no sense a plaint and there can be no question of a party being bound to it.

Even pleadings, however, can be amended at any stage of the proceedings to ensure that justice is done once the interests of the other side are adequately protected by the award of costs and by the amendment. In this case, there was an adjournment for thorough investigation of the allegation that the rent on July 1, 1959, was Shs. 1,250/- per month.

Counsel for the appellant also seemed to found the argument on the basis of estoppel – that the respondent, having said that the standard rent was Shs. 700/- and the applicant having come to meet that case, the respondent should have been estopped from alleging that the standard rent was in fact Shs. 1,250/- per month.

The doctrine of estoppel has been devised to help in the administration of justice. Where one party represents to another that a certain state of facts exists and that party acts on that representation, to its detriment, then the party making the representation shall not be allowed to lead evidence contradicting the facts as originally represented. The purpose is not to exclude the truth from the court, but to decide the issue on the factual situation in which the parties operated – the truth as they understood it.

This principle has no application in this case. Assuming the respondent did represent that the standard rent was Shs. 700/-, the appellant certainly has not acted on this representation to his detriment. In any event, the standard rent once determined adheres to the property until changed in one of the methods envisaged in the Ordinance. To fix a standard rent on the basis of estoppel between two parties, neither of whom is the owner of the premises, appears to me to raise insuperable difficulties.

I am satisfied that the board was justified in acting on the substantial evidence before it in determining that the rent at which the suit premises were let on the prescribed date was Shs. 1,250/- and in stating that that was the standard rent.

Counsel for the appellant had another string to his bow. He urged with much moral justification that it was iniquitous that the respondent should be able to rent the premises at Shs. 600/- and sublet it at Shs. 1,200/-, thus making a clear Shs. 600/- for doing nothing.

It does not appear, however, that the Ordinance forbids this type of conduct – a lacuna which the legislature may well consider.

Section 19 (d) makes it a ground for recovery of possession that the tenant had sublet the whole or any part of the premises for a rent in excess of the rent recoverable under the provisions of this Act. What is a rent in excess of the rent recoverable under the Act is made clear by s. 15, which reads, in part, as follows:

“Where after the commencement of this Act the landlord of any premises or any agent, clerk or other person employed by them, accepts any rent in respect of such premises which exceeds the standard rent thereof by more than any amount permitted under this Act . . . such landlord, agent, clerk, or other person shall be guilty of an offence.”

The penalty is then stated, and the section continues:

“. . . and without prejudice to any other method of recovery thereof, the court by which he is convicted may order that the rent or advance so far as it exceeds the amount permitted under the Act shall be irrecoverable, and that the amount of such excess shall be repaid to the tenant.”

It is true that s. 17 prohibits an increase of contractual rent, even though it is less than the standard rent. The tenancy must first be terminated if it is terminable. Where, for example, the tenant holds under a lease which has not expired, then the contractual rent cannot be increased. In my view, however this does not convert the contractual rent into the standard rent. The standard rent remains, though, by reason of the contract, it cannot be applied between the parties. Should the tenant sublet, however, he would not fall foul of the provision of s. 19 (d) unless he sublet at more than the standard rent.

It may well have been that if the appellant in this case had applied for the determination of the standard rent under s. 4 (2) (a) of the Act, the board may well have found that Shs. 600/- was a proper rent. The board does have power to assess the standard rent at such figure as seems reasonable where it is satisfied that in the special circumstances of the case, it would be fair and reasonable to alter the standard rent as ascertained by determining the rent on the prescribed date. The board can fix the date of such rent to commence retrospectively once the date is no earlier than July 1, 1959. But the board was not asked to exercise that power.

I am satisfied, therefore, that the board could not fix the standard rent at Shs. 700/- or at Shs. 600/- for any of the reasons advanced by the appellant.

The final argument was that the claim was for rent up to February 1, 1965, and for mesne profits thereafter, and that since termination of the tenancy had not been proved, their mesne profits could not be awarded, but only rent. Since the claim for rent was only in respect of one month, the board erred in awarding rent up to September, 1965. It was argued that the difference between rent and mesne profits was fundamental, one being a contractual matter, the other an award by way of damages. Valid though these arguments may be, they are technical, and even in civil proceedings, are curable by appropriate amendment. The figure awarded, Shs. 1,200/- a month, was one agreed by the appellant and paid by him over a long period without complaint. It must have seemed fair. He complained of the increase to Shs. 1,500/-, and this, significantly, was above the standard rent. He never complained about the Shs. 1,200/-, and the board, in my view, was quite right in awarding that sum for occupation for the months of January to September, 1965.

The judgment of the board appears to me eminently correct. The appeal is accordingly dismissed with costs.

Appeal dismissed.

For the appellant:

Tahir Ali

Tahir Ali & Co, Dar-es-Salaam

For the respondent:

RC Kesaria

RC Kesaria, Dar-es-Salaam

B A T Kenya Ltd and another v Express Transport Co Ltd and another
[1968] 1 EA 171 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	30 September 1967
Case Number:	77/1966 (28/68)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Bailment – Carriage of goods – Bailee for reward – Standard of care – Goods not crated – Goods to be insured by owner – Law of Contract Ordinance, s. 103 (T.).*

[2] *Carriage by road – Common carrier – Who is – Law of Contract Ordinance, s. 103 (T.) – Measure of damages against.*

[3] *Carriage by road – Common carrier – Insufficient packing of goods – Effect on liability of carrier for damage to goods.*

[4] *Contract – Exemption clause – Carriage of goods – Small print on letterheads and term in printed form “All goods at owner’s risk” – Whether carrier’s liability for negligent handling of goods excluded.*

[5] *Contract – Insurance – Agreement by owner to insure goods to be carried by road – Whether affects common law liability for negligence of carrier.*

[6] *Damages – Measure of – Against common carrier for damage to machine – Value of property lost – Whether loss of profit recoverable.*

[7] *Negligence – Carriage of goods – Bailee for reward – Goods uncreated – Goods to be insured by owner – Liability of carrier for damage to goods.*

Editor’s Summary

The first and second plaintiffs were tobacco manufacturers. Both were part of a worldwide complex of companies, the first plaintiff being a Kenya company and the second plaintiff a Tanzania company. The two defendant companies were also sister companies of one group, the first defendant being a Kenya company and the second defendant a Tanzania company. Both defendant companies carried on a transport business and the evidence showed that the first defendant had never refused transport work

guided solely by the attractiveness or not of a particular offer. For many years the defendants or their predecessors in the same group had supplied the plaintiffs with transport for their machinery in East Africa. The usual practice was for a director of the first plaintiff to contact a director of the first defendant in Nairobi to make preliminary arrangements. This was done in October when the plaintiffs decided to move some machinery from Nairobi to Dar-es-Salaam, and other machinery, including an A.M.F. Packer machine, from Dar-es-Salaam to Nairobi; and the details of the movement were settled in a later telephone conversation between other officials of the parties. In the course of this talk it was agreed that the plaintiffs would, as usual, insure the goods. A driver of the first defendant duly reported at the premises of the first plaintiff and drove a load of machinery safely to the premises of the second plaintiff at Dar-es-Salaam and off-loaded it. Then his lorry was there loaded with the other machinery for transport to Nairobi including the A.M.F. Packer. The load had to be rearranged at the Dar-es-Salaam yard of the second defendant, because of trouble with the steering of the lorry. In order to do this, employees of the second defendant lifted the A.M.F. Packer (which was not crated) off the lorry with slings and a block and tackle. In the process of re-loading it a sling of the tackle, which had been placed longitudinally along the outer bearers under the base of the machine, slipped. The machine fell to the ground and was damaged. It was thereafter loaded on to the lorry in its damaged state and driven to Nairobi, where an official of the first plaintiff signed a printed form prepared by the first

defendant called a “driver’s instruction briefing form”, in order to release the driver. Upon being unloaded and surveyed in Nairobi the machine appeared to be a total loss, and the plaintiffs then sued the defendants for damages. One of the issues which arose was whether the first defendant was liable as a common carrier. Another was whether the phrase “all goods at owner’s risk” which appeared on the defendants’ letterheads and on the driver’s instruction briefing form excluded any liability.

Held –

- (i) on the facts, the contract for the transport of the machinery was between the first defendant and the first plaintiff and in rearranging the load the second defendant was acting as the agent of the first defendant;
- (ii) the first defendant was a common carrier (test in *Belfast Ropework Co. Ltd. v. Bushell* (1) applied);
- (iii) there was no material on which any finding could be made that the second defendant was a common carrier, the onus being on the plaintiffs; accordingly the second defendant was not a common carrier;
- (iv) as a common carrier, the first defendant was responsible for the safety of the goods in all events except if the loss or injury arose solely from act of God or hostilities involving the State or from the fault of the consignor or inherent vice in the goods themselves;
- (v) both defendants as bailees for reward of the machines were under an obligation to exercise reasonable care in safeguarding them;
- (vi) the onus of proving that they had taken due reasonable and proper care for the due security of the machines lay on the defendants (*Morison, Pollexfen and Blair v. Walton* (3) applied);
- (vii) that onus had not been discharged by the defendants; and it was negligent to place the slings longitudinally along the cross-members of the machine and to use a block and tackle for lifting it;
- (viii) the second defendant, as agent for the first defendant, was negligent in the manner of off-loading and re-loading the machine;
- (ix) the phrase “all goods at owner’s risk” was not brought home to the mind of the plaintiffs’ officials and was ineffective to exempt the defendants from liability (*Curtis v. Chemical Cleaning and Dyeing Co. Ltd.* (5) applied);
- (x) the fact that the first defendant said that it was not insuring the goods and that the first plaintiff said that it would, could not be interpreted as an agreement that the defendant’s common law liability as a carrier and as a bailee was being in any way limited (*Hill v. Scott* (6) applied);
- (xi) a common carrier accepting goods which are insufficiently packed, knowing them to be insufficiently packed, does not by that very fact become liable for loss or damage to the goods in the course of transit. Where, however, the carrier is negligent in respect of the goods he will be liable for loss or damage resulting from his negligence, and the fact that the goods were insufficiently packed will not relieve him of such liability;
- (xii) the machine was insufficiently packed and, although the accident was not caused by this, the insufficiency of the packing contributed to the damage to the extent of 33 $\frac{1}{3}$ per cent;
- (xiii) the correct measure of damages against a common carrier where the goods are entirely lost or destroyed is *prima facie* the value of the property lost;

- (xiv) the value of the machine in the circumstances was the price paid by the first plaintiff to the second plaintiff for it;
- (xv) neither defendant was on notice that delay in delivery of the machine would cause particular loss, so that loss of profit should not be awarded; but

interest at seven per cent. should be awarded (*British Columbia etc. Saw Mill Co. Ltd. v. Nettleship* (11) applied);

- (xvi) the scrap value of the machine (including some moveable parts and spares supplied with it) should be deducted to arrive at the figure for damages.

Judgment for the first plaintiff against both defendants for Shs. 92,933/- less the scrap value of the machine (including the spares and parts dismantled therefrom in preparation for transport), with interest. Judgment for both defendants against the second plaintiff with no order as to costs. First defendant to pay first plaintiff two-thirds of its taxed costs.

Cases referred to in judgment:

- (1) *Belfast Ropework Co. Ltd. v. Bushell*, [1918] 1 K.B. 210.
- (2) *Joseph Travers & Sons Ltd. v. Cooper*, [1915] 1 K.B. 73.
- (3) *Morison, Pollexfen and Blair v. Walton*, (H.L.) (unreported).
- (4) *Brooks Wharf and Bull Wharf Ltd. v. Goodman Bros.*, [1936] 3 All E.R. 696.
- (5) *Curtis v. Chemical Cleaning and Dyeing Co. Ltd.*, [1951] 1 All E.R. 631.
- (6) *Hill v. Scott*, [1895] 2 Q.B. 371, 713.
- (7) *Stuart v. Crawley* (1818), 2 Stark. 322; 171 E.R. 660.
- (8) *Higginbotham v. The Great Northern Railway* (1861), 2 F. & F. 796; 175 E.R. 1289.
- (9) *Barbour v. South Eastern Railway* (1876), 34 L.T. 67.
- (10) *Gould v. South Eastern and Chatham Railway*, [1920] 2 K.B. 186.
- (11) *British Columbia etc. Saw Mill Co. Ltd. v. Nettleship* (1868), L.R. 3 C.P. 499.

Judgment

Georges CJ: The plaintiffs in this case are manufacturers of cigarettes, cigars and tobacco products generally. They are what may be called sister companies in a worldwide complex. Prior to 1961, there had been only one company in East Africa controlled from Nairobi in Kenya. This East African company has now disappeared and has been replaced with three companies, one operating in each of the East African countries. I have been asked to say that the first plaintiff, the Kenya company, still in fact exercises headquarters control and that the second plaintiff is de facto a branch of it. There is no evidence to support such a finding.

The defendants are also sister companies. The second defendant was at one time a branch of Express Transport East Africa, Ltd. Like the plaintiffs, they have now created separate juridical entities in Kenya and Tanzania and each appears to be master in its own house.

Though an inordinate length of time had to be devoted to examining the facts of this case, the area of factual conflict is really quite slight.

For a number of years, well before the companies split up into their territorial units, the Express

Transport organization, to use a comprehensive term, has supplied transport for the British American Tobacco organisation. As could well be understood, where businessmen were involved, there was little concern as to which juridical personality was engaged in any one transaction after the separate territorial companies were formed. The fact was one organisation served the other with their resources all interlocked.

In Nairobi there existed a close personal relationship between Mr. Shiel, the Engineering Manager of B.A.T. (Kenya), and Mr. Reuben, a Director of Express Transport (Kenya). They were on Christian-name terms. I accept that the pattern was that whenever B.A.T. (Kenya) wanted machinery transported, Mr. Shiel would ring Mr. Reuben giving an outline of the movement

which was planned and some approximation of the date when it would take place. Mr. Reuben would accept the job, asking that he be given as much notice as possible of the exact date when it would become known.

Somewhere towards the end of October, it became clear that there would be a series of machinery movements between B.A.T. companies in Kenya and Tanzania. A new A.M.F. Packer was to arrive in Dar-es-Salaam and the A.M.F. Packer in use there, as well as a Scandia Wrapper and an Ayers & Grimshaw Parcelling Machine, were to be moved to Nairobi, while a P.A. 7 R.O. machine was to be moved to Dar-es-Salaam. Mr. Shiel discussed the movement with Mr. Reuben as was customary, and Mr. Reuben agreed to carry it out. The date of the actual transport depended on the arrival of the new A.M.F. Packer in Dar-es-Salaam.

After this initial arrangement, Mr. Shiel fell ill and was away from his office. The transaction was finalised, it would appear, on the telephone between Mr. Jansen of Express Transport (Kenya) and Mrs. McLaughlin, Mr. Shiel's secretary. The price for the job was agreed. Mr. Jansen told Mrs. McLaughlin that this price did not include a premium for insuring the machinery and that B.A.T. (Kenya) should make its own insurance arrangements. Mrs. McLaughlin agreed that the company would, as it had always done.

On November 20, Express Transport (Kenya) sent a seven ton lorry, driven by the witness Mr. Samson Ndisii Ndunda, to the premises of B.A.T. (Kenya) to carry out the job. The driver had with him a document entitled "driver's instructions briefing form", which has been tendered in evidence and marked "A". Mr. Jansen's evidence is that he was supposed to hand this form to the appropriate official at B.A.T. (Kenya) so that the customer would be able to identify the driver as the person sent to do the job.

As much of the defence hinges on this form, it is well to note that Mr. Jensen stated that it would contain as much detail of the job as possible – where the driver was to report, the nature of the load to be carried and the destination for delivery. He also stated that the driver should present the form to the customer so that the "customer may know for what purpose he is going there". There is no provision that the form should be signed by the customer at that stage, nor is it left with him. In cross-examination, Mr. Jansen added that the form provided the company with a record of that particular transaction should there be a query later on, and that record was an internal record of his company. It should also be noted that this form comes into existence after agreement has been reached on the issues of price and on the date when the job is to be carried out. It purports to be instructions for the driver.

There is a conflict of evidence as to whether the driver ever handed this form to anyone on the premises of B.A.T. (Kenya) when he called for the load. He said he handed the form to a clerk – who was a witness in this case – quite likely, Mr. Jasper Aron. Mr. Aron denied that the form was handed to him then. He stated that usually, when machinery is to be moved, he is informed well beforehand. He knows when the lorry is due and is expecting it. The drivers know him and merely report their arrival to him, whereupon he directs them to the proper place for loading and supervises the loading. He agreed that he had often seen the briefing form, but only when he receives a load. Then he signs to release the driver, acknowledging that the load has been delivered in apparent good order.

I accept the evidence of Mr. Aron in preference to that of Mr. Ndunda on that point. He impressed me as the more reliable witness, and there is nothing in his story which can be termed not plausible.

Having loaded his machinery, Mr. Ndunda drove to Dar-es-Salaam and duly arrived at the premises of B.A.T. (Tanzania). He reported to Mr. Edroos,

who arranged for the unloading of the lorry. At this point again, there is a conflict of evidence – in my view, of no materiality as far as the legal consequences are concerned, but it may be preferable to make a precise finding on it.

There were five packages to be loaded on the lorry in Dar-es-Salaam – a Scandia Wrapper, an Ayres & Grimshaw Parcelling Machine, an A.M.F. Packer and two crates of parts. The crates of parts were comparatively light, about 250 lbs. each, and could be manhandled. The A.M.F. Packer was very heavy, about 2½ tons. The Wrapper and Parcelling Machine weighed approximately 967 lbs. and 359 lbs. respectively. Mr. Edroos stated that the driver asked that the A.M.F. Packer be loaded at the back of the lorry as he feared that the Parceller and the Wrapper, as lighter machines, would jump as he bumped along the rougher parts of the road to Nairobi. The driver denies this. He said he was no more than a spectator to the loading, standing near his cab or sitting about. It should be noted that Mr. Clarke confirms that immediately after the accident, Mr. Edroos had told him that the load had been placed as it was on the instructions of the driver. But this was after the accident, when the urge to shift responsibility would be very strong. If the load had been placed as it was on the driver's instructions, it seems unlikely that B.A.T. (Tanzania) would have agreed so readily to pay to have it rearranged by Express Transport (Tanzania). The evidence is that Mr. Hekhan of Express Transport (Tanzania) spoke first to Mr. Edroos about rearranging the load. Mr. Edroos put him on to Mr. Clarke, and there would have been opportunity to explain to Mr. Clarke what the true position was. Mr. Edroos was positive that the driver arrived with four or five turnboys – which I find not to be the truth. From the evidence, it would appear that the person described as the "fat Indian man" who can be seen in the photograph P. 10 (e) was much more directly connected with the loading than Mr. Edroos. I would accept the driver's version in preference to that of Mr. Edroos. On the other hand, I do not think Mr. Ndunda made any complaint about the steering before he left the premises of B.A.T. (Tanzania). It was most unlikely that any of the employees there would have said that they had no adequate equipment for rearranging the load. Their equipment was certainly better than that in the yards of Express Transport (Tanzania) in that they had a forklift which could lift the heaviest load – the A.M.F. Packer. The trouble with the steering may well not have been really obvious until the lorry had been driven away.

There is no dispute about the fact that the driver complained at the premises of Express Transport (Tanzania) that the steering was light and tended to pull to the right. Mr. Hekhan, transport-in-charge of Express Transport (Tanzania), spoke to Mr. Edroos at B.A.T. (Tanzania), who put him on to Mr. Clarke. Mr. Clarke agreed that Mr. Hekhan should rearrange the load. They agreed on a price of Shs. 150/-. Mr. Clarke asked specifically whether he had adequate equipment to do the job. He said he had.

Of the three machines on the lorry, one was crated – the Wrapper – and the other two were not crated. The heavy one, the A.M.F. Packer, was bolted on to a wooden base, the base itself resting on five cross members. Along one edge were two cross members, quite close to each other. The cross members were about six inches wide and three to four inches high. No part of the machine protruded beyond the area of the base. Swinging movable parts had been detached and packed in one of the crates which formed part of the load. From base to highest point (the hopper) the machine measured six feet five inches. There still remained on the machine various projecting parts. The photograph exhibit P.2 gives an idea of what the machine looked like, though it was taken after it had fallen and suffered damage.

Mr. Hekhan did not himself supervise the rearrangement of the load. This was done by Mr. Saidi Pazi – a gang leader in the employ of Express Transport

(Tanzania). He has had about nine years experience in lifting heavy loads. Mr. Hekhan states that, of the two of them, Mr. Pazi has had more experience of actual lifting, and I accept that. But the fact remains that Mr. Pazi is a person with serious limitations. He is not really literate and he could give no estimate of distances or lengths in terms of feet. It would appear to me that for routine tasks or under supervision he would be quite competent. He did not impress me as the sort of person to whom a slightly unusual task should be entrusted without direct assistance.

As I have mentioned, two of the machines were not crated. That was not unusual as far as the parties were concerned. For factory-to-factory moves, the B.A.T. companies do not always crate machinery. Normally, of course, they are themselves responsible for the loading and unloading and they have teams experienced in those operations.

Mr. Pazi states that his first thought was to move the two crates which had been placed between the Wrapper and the Parceller up front and the A.M.F. Packer in the back, push the A.M.F. Packer forward and then place the crates behind. This would, apparently, have put the whole weight of the Packer forward of the rear axle and provided for an adequate redistribution of the load. He says he could not do that because there was a projection which prevented the A.M.F. Packer from being pushed forward and also prevented the workmen from manhandling the crate over the side of the lorry. The crate fitted underneath the projection. I have grave doubts whether that is true. I am satisfied that no part of the Packer projected beyond its base. I doubt very much whether any part of the other uncrated machines did. The evidence is that the team at B.A.T. (Tanzania) manhandled the crates over the side of the lorry after the A.M.F. Packer had been loaded on.

In the event, Mr. Pazi decided to unload the lorry completely and place the A.M.F. Packer right up front. To move the Packer, he used a block and tackle with a maximum clearance from the bottom of the hook to ground level of eleven feet five inches. The lorry tray was approximately four feet above the ground. For this particular operation, steel slings were used. This meant that the machine had to be lifted almost to the maximum height to handle it. Mr. Pazi said that he placed the slings transversely to the cross members, lifted the machine, had the truck move forward and then lowered the machine to the ground. The block and tackle was then pushed along the carriageway to lift the other packages off the lorry, leaving the sling on the Packer. When the tray was clear, he then lifted the Packer again and asked the lorry driver to back up under it. As the lorry drew close, it was clear that the load was not high enough. He pulled further on the tackle to lift it a bit higher, and suddenly one side of the sling slipped. The machine did not fall straight; it canted over on one edge and rolled over resting partly on its upper portion. It was quite badly damaged.

I do not accept the evidence of Mr. Pazi when he says that he placed the slings transversely to the cross members. Mr. A. R. Blakeman saw the machine before it had been moved again, and his evidence is clear that the slings had been placed longitudinally along the outer bearers. Mr. Pazi was positive he had not placed the slings longitudinally, because in cases such as this, slings are never placed longitudinally along members. He himself had never seen it done that way.

The machine was eventually righted with the help of the block and tackle. Next day, officials of B.A.T. (Tanzania) were informed, and Mr. Clarke went to inspect the damage. He suggested that Lloyd's surveyor be called in to view, and Mr. Taylor arranged to have the machine surveyed by Mr. A. R. Blakeman, who gave evidence for the defence.

were useful. They supplied the material for basing the finding that the elings had been placed longitudinally along the bearers. His probable explanation at that time for the accident was that the sling had come up against a projection of the machine, then slipped off the projection as it took the strain of the weight, causing the sling to slip off. Having heard that the machine had been rested on the ground with the sling in place and had afterwards been lifted, he thought another explanation could be advanced. The steel slings have great tension, and when the strain is taken off, they tend to twist. This movement could bring them closer to the edge than they had been originally. The slings could, therefore, have moved thus while the load was resting, and later, as it was lifted with the slings closer to the edge, the slipping took place, particularly as the manual operation of the tackle would tend to jerk the load as it was lifted with each pull.

There is no evidence as to how the machine was eventually reloaded on the lorry, but apparently it was, and taken to Nairobi. There Mr. Aron duly signed the driver's instructions briefing form in the space provided for the customer's signature. Very clearly, the load had not been delivered in good order, and that would have been clear to anyone, but he signed the document to release the driver. Mr. Aron said that he had never read one of the forms. He knew that it was a driver's instructions briefing form and that he signed it to release the driver when the job was completed. Mr. Shiel, who generally arranged matters with Mr. Reuben, had never seen one of these forms until the particular form in this case was produced in Court on the first day the case was listed for hearing.

At Nairobi, the machine was off-loaded and surveyed by Mr. W. J. Blakeman. He thought it was a total loss. Mr. A. R. Blakeman also thought that in all probability the machine would have been a total loss. It is in these circumstances that the plaintiffs sue the defendants for the damage they have suffered.

It may be well at the outset to state what is my view of the relationship inter se between the plaintiffs and between the defendants in this case. The original contract for transport was between the first plaintiff, B.A.T. (Kenya) and the first defendant, Express Transport (Kenya). The contract involved movement of machinery on behalf of B.A.T. (Tanzania) as well, but I am satisfied that in arranging for the transport, the Kenya company was not acting as agent for the Tanzania company. It was acting on its own and arranging both trips in a manner most convenient for its purposes and probably at the most economical price. In unloading and loading the lorry in Dar-es-Salaam, the B.A.T. (Tanzania) company was not acting on its own. It was acting on behalf of the Kenya company which was primarily responsible for the entire operation. No contractual relationship existed between B.A.T. (Tanzania) and Express Transport (Kenya). I am also satisfied that the rearranging of the load by Express Transport (Tanzania) cannot be viewed as a separate contract. B.A.T. (Tanzania) was acting as agent for B.A.T. (Kenya), just as they had been acting on that company's behalf when they placed the load on the lorry in the first instance at their plant premises. Similarly, Express Transport (Tanzania) was acting as agent for their Nairobi sister company in doing the rearranging. It matters not whether they would have kept the fee of Shs. 150/-. As agents, they would have been entitled to charge the principal a fee for the agency service performed, and it would be the simplest course to keep the amount they had in fact charged. In the same way, B.A.T. (Kenya) and B.A.T. (Tanzania) would eventually have apportioned the cost of the transport. but that of itself does not help to establish that the Kenya company was acting as agent of the Tanzania company.

The first issue to be considered is whether the first defendant was a common carrier, subject to the liabilities of persons in that class. Unhappily the concept of common carrier is not easy to define. The difficulties are such that I am minded to think that in the interests of both logic and good sense, the

concept could usefully be abandoned. The fact is, however, that it has been adopted into the

Laws of Tanzania, and is specifically mentioned in s. 103 of the Contract Ordinance, Cap. 433.

In *Belfast Ropework Co. Ltd. v. Bushell* ([1918] 1 K.B. 210), the following passage occurs (ibid. at p. 214):

“One would suppose that there ought to be some simple test by which it could be determined without difficulty whether a man is a common or a private carrier, but now that the old idea that to be a common carrier by land a man must carry between fixed termini or at any rate within defined districts has been abandoned, I confess that I find considerable difficulty in framing the question, the answer to which would be conclusive one way or the other. If one asks whether a carrier is prepared to carry for all who choose to employ him, the answer would in almost all cases be yes. Every carrier, common or private, who seeks employment for his lorries or carts, desires all persons who have goods to be carried to come to him. It is only to the extent to which such persons resort to him that his business flourishes. If one asks whether a carrier is prepared to carry at a reasonable rate, the answer would again be yes. No carrier, common or private, would profess to charge unreasonable rates. If one asks whether a carrier is bound to carry at any reasonable rate that may be offered, that is only another way of asking whether he is a common carrier. The same difficulty presents itself if one asks whether he would be liable to indictment if he refused so to carry. To answer that question, it must first be determined whether he is a common carrier or not.

For the purpose of my present decision, I fall back upon this question. Did the defendant while inviting all and sundry to employ him, reserve to himself the right of accepting or rejecting their offers of goods for carriage, whether his lorries were full or empty, being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability?”

In that case, there was evidence that the defendant had refused offers for transporting cotton, acetylene and ships’ stores.

The evidence of the defendants in this case is that the first defendant is the leading transporter in Kenya, if not in all East Africa.

Mr. Shiel states that they have never refused any offer to provide transportation which he has made to them. Mr. Jansen’s evidence was that invariably they would hire a vehicle to anyone who asked for it if a vehicle were available. He went on to add that this had been their practice in the past and that their rates had always been reasonable. In examination-in-chief, to counsel for the defendants, he stated that there had been occasions when they had refused jobs. As instances, he quoted occasions when in their opinion there was too much risk attached or the load was an awkward one for which their vehicles were not equipped. It would appear that at least in the case of B.A.T. (Kenya) there was a standing hourly charge for the use of their vehicles in or about Nairobi, and rates would have to be negotiated only for longer hauls.

Mr. Taylor said that the company was allowed to pick and choose their customers because it had to get a short-term T.L.B. Licence for a trip of thirty miles. He stated that it depended on the type of work and the creditworthiness of the customer. A common carrier is entitled to demand his charges before agreeing to supply transport.

In cross-examination, he clarified the statement that the company would refuse work depending on the type. He agreed that this meant, for example, that the company would have to refuse an offer to transport ice-cream in Nairobi if the company had no refrigerated lorry.

Looking at the evidence, it is clear that the Express Transport Company has never refused work guided solely by the attractiveness or not of a particular offer. Though the officials talk of a right to pick and choose customers, they have given no specific instances of their having done so, and the hypothetical cases they have cited as indicating circumstances under which they would decline are circumstances under which a common carrier could also decline. A common carrier is not bound to carry dangerous goods, nor, obviously, is he bound to accept offers when he lacks the resources to fulfil them. I find, therefore, that the first defendant, Express Transport (Kenya) was a common carrier.

There is no material on which any finding can be made that the Tanzania company is a common carrier. The burden of establishing this would be on the plaintiffs. They have not discharged the onus, and accordingly I find that the second defendants are not common carriers.

As a common carrier, the first defendant would be responsible for the safety of the goods in all events except if the loss or injury arose solely from act of God or hostilities involving the State or from the fault of the consignor or inherent vice in the goods themselves; 4 Halsbury's Laws (3rd Edn.), p. 141, para. 382. Of these, only one is relevant here – fault of the consignor. It has been argued that the despatch of the A.M.F. Packer uncrated was carelessness on the part of the consignor and that the damage arose principally because of that. This contention deserves to be examined closely, but before so doing, it may be well to decide whether or not the first defendant was negligent in the handling of the machinery. Negligence affords an alternative ground of claim if the first defendant should be held not to be common carriers, and may also be of relevance in determining whether or not, if they were common carriers, they can escape liability completely under the exception that damage arose from the fault of the consignor.

It is argued for the plaintiffs, and I accept their contention on that point, that both defendants, as bailees for reward of the machines, were under an obligation to exercise reasonable care in safeguarding them. The standard of care for bailees here in Tanzania is defined in s. 103 of the Law of Contract Ordinance:

“In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.”

No particulars of negligence were set out in the plaint and none were asked. The plaintiffs relied on the fact that the machine had fallen as proof that there was carelessness. This appears to me quite sound and there is support for it not only in common sense but in judicial authority.

In *Joseph Travers & Sons Ltd. v. Cooper*, Kennedy, L.J. ([1915] 1 K.B. at p. 90) quotes from a speech of Lord Halsbury in an unreported case in the House of Lords – *Morison, Pollexfen and Blair v. Walton* (3):

“It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment, the proof of that rested upon him.”

The defendants have not satisfied me that they took due, reasonable and proper care for the due security of the machines. In particular, I am satisfied that it was negligent to place the slings longitudinally along the cross members. This meant that the weight of the machine was not equally distributed on all the cross members as it should have been. Mr. Pazi himself denied that he had placed the slings longitudinally. He had never seen it done that way in his years of lifting.

Mr. A. R. Blakeman says that he would not say that this method was careless. I think it is. It means that the slings have to be placed much closer to the edge of the load than they would otherwise have to be. Since the grain of the wood runs longitudinally, it means that the danger of the slings slipping by scruffing of the cross members is seriously increased.

I am also satisfied that the block and tackle was not a fit and proper machine for lifting the A.M.F. Packer. The evidence establishes that the packer would have to be raised right up to the level of the hook in order to lift the machine a height of five feet. The tray of the lorry was some four feet off the ground. This meant that there was no headroom and the slings had to come up against the machine. The risk of the slings fouling against a projection, then suddenly working free causing the sling to whip, was in the circumstances a real risk. There is no evidence that Mr. Pazi appreciated this or took this into account on the placing of slings.

Again, since the load had been rested on the ground after being taken off the lorry, there was the possibility that the steel slings would twist and move with the tension removed. Placed as they were along a comparatively narrow cross bearer, there was a real risk that they would move so close to the edge that the jerking motion as the men pulled on the tackle to lift the weight would shift the machine sufficiently to cause the sling to slip.

A statement of Lord Dunedin quoted in the case of *Brooks Wharf and Bull Wharf Ltd. v. Goodman Bros.* appears to me aptly to indicate the proper approach to this case ([1936] 3 All E.R. at p. 702):

“I think this is a case where the circumstances warrant the view that the fact of the accident is relevant to infer negligence. But what is the next step? I think that if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears and the pursuer is left as he began, namely that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion.”

Loads do not fall from slings unless something goes wrong. The defendants have not given any explanation as to what went wrong – still less an explanation inconsistent with negligence on their part. On the other hand, the plaintiffs have advanced explanations, each probable and each involving negligence on the defendants’ part. Accordingly, I find that the second defendant was negligent in the manner of off-loading and re-loading the machine. As I have already found, the second defendants were acting as agents for the first defendants and they are therefore vicariously liable in negligence.

Evidence has been led to establish that in any event there was a simpler method of effecting the redistribution by merely lifting the crates of spares and pushing the packer forward. On the facts, I think this could have been done. I do not think, however, that it was negligent to attempt the redistribution which was attempted. The fault lay in the methods which were used.

In addition to liability as common carriers, the first defendant was liable to the first plaintiff in negligence, and the second defendant was also liable in negligence.

This is a convenient stage at which to examine the question as to whether or not the defendants or either of them were exempted from liability under either of these heads by reason of any term in the contract between the first defendant and the first plaintiff.

This defence of limitation of liability was not raised until the first day of the hearing before me. Counsel for the defendants stated that it had only been over the week-end that the driver’s instructions briefing form had been found and he

sought leave to amend his claim by adding to para 6. of his written statement of defence the words “and further stated that even if negligence is alleged, they are not liable in law as liability was expressly limited”. Leave was granted and the plaintiffs were granted leave to deliver an amended reply. The plaintiffs also asked for particulars of this limitation of liability – whether it was oral or written, the date and place of such agreement and the extent of limitation.

These particulars were delivered. It was stated that the liability was limited by the document headed “driver’s instructions”, a copy of which had been handed to counsel for the plaintiff that morning, that the date and place appeared in that document and that the limitation of liability extended to all risks.

In the course of evidence, the defendants’ letterheads were tendered in evidence to show the format thereof. At the top and at the bottom of the letterheads are set out in what can justifiably be called “small print” the words: “The Company shall have a general as well as a particular lien on all goods for unpaid accounts. All goods at owner’s risk”, and “No liability whatsoever is accepted by the Company for goods stored or handled.”

Mr. Shiel said that he had received correspondence from the first defendant and would not doubt that it was on a letterhead of that format. It clearly emerges as an inference from his evidence that he had never paid any particular attention to these words in small print. He was never directly challenged as to whether he had seen them before. What he did say, which I accept, is that whenever he received a letter from the first defendant he would be concerned with the contents of the letter, not with format of the letter which contained much information, such as directors’ names, which, though of use, would not be relevant to the matter in hand. Mr. Shiel stated positively that throughout the years he had dealt with Mr. Reuben, he had never thought that the company’s contracts for transportation were on a no-liability basis – though generally he would have thought that such contracts would be subject to conditions. I accept this evidence as truthful.

Mr. Shiel had never seen the driver’s instructions briefing form until he saw one in court. On this form, the clauses purporting to limit liability are certainly in legible print. They are in the top right hand corner of the document in capitals. The phrases are the same as those on the letterhead.

On the evidence before me, I am satisfied that those phrases were never brought home to the attention of Mr. Shiel, the man at B.A.T. (Kenya) who dealt with the machinery transportation contracts with Express Transport (Kenya).

It was also argued that in any event, Mr. Aron had signed the form and that he must have seen it when the driver, Mr. Ndunda, called to collect the load. I have already held as a matter of fact that he did not see it then. He certainly signed it, but at a stage when the whole contract had already been performed and he signed purely to release the driver.

The words of Denning, L.J., in *Curtis v. Chemical Cleaning and Dyeing Co. Ltd.* ([1951] 1 All E.R. 631) are relevant in this case. There the customer signed a document as she handed over a wedding dress to be cleaned. She asked the assistant what the phrase on the document exempting the company from liability meant. The attendant said it referred to damage to beads and sequins. The dress was later returned with a stain which the judge found had not been there when the dress had been handed in.

Denning, L.J., said (*ibid.* at p. 633):

“The present case is of importance because of the many instances nowadays when people sign printed forms without reading them, only to find afterwards that they contain stringent clauses exempting the other side

from their common law liabilities. In every such case it must be remembered that, if a

person wishes to exempt himself from a liability which the common law imposes on him, he can do it only by an express stipulation brought home to the party affected and assented to by him as part of the contract. If the party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses.”

There is no evidence in this case that the exempting clause was brought home to the mind of anyone at B.A.T. (Kenya) or at B.A.T. (Tanzania). It is true that a document was presented for signature, but that was done at the end when performance was completed. It would be quite reasonable to think that the document contained no contractual terms, but was merely an acknowledgment that the driver had completed his task. It should be noted that the form carries a note in red print marked important, warning the person releasing the driver to telephone the transport department before doing so if he had any query to make regarding the manner in which the job had been carried out.

I am satisfied that this document is not a contract document and the purported exemption of liability claimed by virtue of the phrases on it are ineffective.

Counsel for the defendants argued that from the course of dealing between the parties, the only commonsense conclusion at which one could reach is that the plaintiffs knew of this clause exempting the defendants from liability. The evidence does not support the proposition.

There remains the conversation between Mrs. McLaughlin and Mr. Janson. Mr. Janson made it clear that the transport price did not include a premium for insurance for the machinery and that the first plaintiff should make its own insurance arrangements. Mrs. McLaughlin agreed that the first plaintiff would make its own insurance arrangements.

The fact that the first defendant said that it was not insuring the goods and that the first plaintiff said that it would cannot, in my view, be interpreted as an agreement between them that that defendant’s common law liability as a carrier and as a bailee was being in any way limited.

In *Hill v. Scott* ([1895] 2 Q.B. 371 and 713) the plaintiff, a wool merchant at Bradford, bought wool in London and handed a delivery order to the defendant who shipped the wool on board his steamer in London, carried it by sea to Goole and forwarded it by rail to Bradford, charging the plaintiff a through rate per ton, which covered all expenses including insurance. The insurance was effected by the defendant who selected the underwriters and paid the premium after receiving directions from the plaintiff as to the amount for which he was to insure. The plaintiff did not receive possession of the policy and on previous occasions when losses had occurred, the defendant had received payment from the underwriters and had settled with the plaintiff. The wool was shipped without a bill of lading. Wool was damaged during the voyage, and the insurers delayed payment claiming that there had been a delay in making the claim. Accordingly, the plaintiff sued the carrier for the damage suffered.

It was held that the defendant had insured the wool, not as agent for the plaintiff, but to cover his liability as carrier, and had not either expressly or implicitly stipulated for any limitation of liability and therefore was liable without proof of negligence.

Lord Russell, C.J., in the course of the judgment, said:

“Was there in the contract any stipulation, express or properly implied, the effect of which was to limit the defendant’s liability? In the present case there is no written statement of all the terms of the contract, there are no

circulars or notices, but the defendant contends that a limitation is to be implied from the course of dealing between the parties.”

The learned Chief Justice then reviewed the course of business between the parties, which has been summarised briefly above and continues:

“The main contest was this: Was the right inference to be drawn, the inference that the insurance was effected by the defendant as agent for the plaintiff, or was it a mere request that the wool be insured by the defendant? The defendant says the effect is that the plaintiff stipulates that the defendant shall insure the wool at £15 a bale, and agrees not to look to the defendant for any loss or damage so far as such loss or damage is covered by the insurance. The plaintiff says it simply means this: ‘I, the owner of the goods, require you, the shipowner, to insure. You as carrier have an insurable interest and I require you to insure, in order to secure for myself a greater certainty of payment in the event of loss’.”

The defendant’s liability as a common carrier remained untouched by the insurance.

The case was taken on appeal and the appeal failed. There is a short judgment by Lord Esher, M.R., in which Kay and Lopes, L.JJ., concurred. Lord Esher is reported as saying ([1895] 2 Q.B.D. at p. 714):

“Even if the insurance had been effected on behalf of the plaintiff, it would give him additional protection in case of loss, but would not thereby lose his right to go against the defendant and would be at liberty to sue either the defendant or the insurers.”

With this approach, I respectfully agree. The fact that the carrier states that he is not insuring and asks the owner to insure cannot be developed into an agreement between the owner and the carrier limiting the carrier’s liability.

I have noted counsel for the plaintiff’s argument that the conversation between Mrs. McLaughlin and Mr. Jansen had not been pleaded in the particulars of limitation as one of the matters relied upon. The fact, however, is that details of that conversation were admitted by consent. Counsel for the plaintiff, in his address, says that his consent was as to manner of proof, not relevance. I did not so understand it at the time, and I doubt whether it was, as my recollection is that at the time no reference was made as to pleadings and the argument centred around the admission of one or both letters. In the view I take of the matter, the admission of the evidence cannot help the defendants.

In the result, I find the first defendant’s liability as a common carrier to be unaffected by any clause limiting liability, nor is the second defendant’s liability as a bailee limited in any way. As I have found that there was no clause in the contract limiting liability, the first defendant’s liability in negligence at common law if he was not a common carrier would be unlimited.

There remains the question as to whether the first defendant can avoid liability on the ground that the damage arose from the fault of the consignor in that the goods were improperly packed.

I have considered the cases on this aspect of the matter: *Stuart v. Crawley* ((1818), 2 Stark. 322; 171 E.R. 660); *Higginbotham v. The Great Northern Railway* ((1861), 2 F. & F. 796; 175 E.R. 1289); *Barbour v. South Eastern Railway* ((1876); 34 L.T. 67); and *Gould v. South Eastern and Chatham Railway* ([1920] 2 K.B. 186). They appear to me to be all fundamentally reconcilable, despite the doubts which have been cast on Lord Ellenborough’s statement in *Stuart v. Crawley*.

The principle which emerges appears to me to be this: a common carrier accepting goods which are insufficiently packed, knowing them to be insufficiently packed, does not by that very fact become liable for loss or damage to the goods in the course of transit. Where, however, the carrier is negligent in respect of the goods, he will be liable for the loss or damage resulting from his negligence, and the fact that the goods were insufficiently packed will not relieve him of such liability.

Hypothetical situations connected with the facts of this case may help to illustrate. If, without any negligence on his part, the driver of the lorry had been involved in an accident en route to Nairobi, and as a result the Packer had been damaged because it had not been crated, the first plaintiff could plead the insufficiency of the packing as a defence to any claim based on his liability as an insurer. Where, however, the carrier is negligent, as has been found in this case, the question is whether the damage was caused by the negligence or by the insufficiency of the packing, or if by both, in what proportions?

The factual question as to whether or not the A.M.F. Packer in the condition in which it was despatched was insufficiently packed is not easy of resolution. Clearly it would have been better to have put it in its original crate, which was available and could have been used at a negligible cost, having regard to the value of the machine. On the other hand, the plaintiffs had regularly transported their machines between factories in that condition and only once had a machine suffered minor damage when, through a misunderstanding, it was carried over a much longer journey than it ought to have been.

On balance, however, I am of the view that the machine was insufficiently packed. Counsel for the defendants has argued that the accident was itself due to this improper packing. Had the machine been crated, the top of the crate would have acted as a spreader and the sides would have prevented all contact between the slings and the machine. This may be so, but I am not satisfied that the accident arose in any way from the fact that the machine was not crated. The use of a block and tackle without proper headroom, the placing of the slings longitudinally instead of transversely to the cross bearers and possibly the inadequate checking of the slings to ensure that they had not moved after the load had been rested on the ground – those appear to be the causes of the accident. It is clear to me, however, that the damage did not result solely from that negligence. The insufficiency of the packing was a contributory factor. There has been much argument and the opinions on the matter are contradictory. I have no hesitation whatever in accepting the opinion of Mr. A. R. Blakeman that crating would have helped significantly in absorbing the impact directly transmitted to the machine, and that would have minimised damage. There is no evidence to guide me accurately in dividing the two. I do not find the analogy with the lathe cited by Mr. A. R. Blakeman convincing. The constructions of the machines, though having certain basic similarities, are much too different to afford much guidance. I am left to do as best I can. I think the damage would still have been substantial even if the machine had been crated and I would estimate the damage due to the insufficiency of packing at 33? per cent., and the damage resulting from the negligence of the defendants at 66? per cent.

The question of damage in this case is also hotly contested. Against the first defendant, damages could be awarded both under the headings tort and breach of contract. Holding as I have that the second defendant was acting merely as agent for the first defendant in rearranging the load, damages could be awarded only in tort. It is only reasonable that the total damages should be the same, no matter under what head assessed.

I adopt, respectfully, the test laid down in 4 Halsbury's Laws (3rd Edn.), p. 151, para. 399, defining the measure of damages which should be awarded against a carrier:

"Where goods are entirely destroyed or lost by a common carrier, the measure of the damages recoverable against the carrier is *prima facie* the value of the property lost."

Counsel for the plaintiff has argued that to place the plaintiffs in the same position in which they would have been had the contract not been broken, it was necessary to pay the cost of acquiring a new A.M.F. Packer 1600 machine. He claimed that as the measure of damages. Such a machine would have been available in early 1966 from the manufacturer's plant in Brazil and the price in Mombasa with a one per cent. charge for handling would have been Shs. 177,850/- at the then current rate of exchange.

Mr. Green, the secretary of the second plaintiff, stated that they had sold the machine to the first plaintiff for Shs. 139,399/61, the value at which the machine stood in their books, being the cost price less depreciation. The machine had been imported towards the end of 1963, had been installed in November, 1964 and had been in use until it was prepared for transport. The first plaintiff did not in fact purchase an A.M.F. Packer 1600. They have since purchased A.M.F. Packers 3000, but there would seem to be no connection between these purchases and the damage to the 1600 A.M.F. Packer.

In those circumstances, I find that the value of the property lost is the price paid by the first plaintiff for the machine.

Normally, carriers are not liable for loss of profit. It has not been suggested that either defendant was in any way made aware that that delay in delivery would cause any particular loss to the first plaintiff.

In 4 Halsbury's Laws (3rd Edn.), p. 152, para. 402:

"Where goods are lost, and in consequence the owner suffers pecuniary loss in respect of profits which he would have made by their use in the time which must elapse before the goods can be replaced, the value of the lost goods can be recovered, but not such profits, in the absence of proper notice."

This principle is supported by the case of *British Columbia etc. Saw Mill Co. Ltd. v. Nettleship* ((1868), L.R. 3 C.P. 499).

There the Judges of the Queen's Bench Division decided that the proper method for compensating the plaintiff for the delay they had suffered in the erection of a mill through non-delivery of a part was by the application of the rule which obtains in the case of the non-payment of money, viz. by allowing interest on the value of the goods which had to be replaced. This seems to me to meet the justice of the case. The plaintiffs have claimed nine per cent. This errs on the high side. Interest at seven per cent. is appropriate.

Before determining the final award, two comparatively small matters must be dealt with. The defendants argued that the value of the machine as scrap should be deducted from the damages. I agree. The first plaintiff still has the machine in its godown and it is not unreasonable to presume that it can be sold as scrap. I have not been told what was the price of scrap iron in Kenya about the time of this accident, but it should not be a matter difficult to ascertain.

It is also urged that I should deduct from the damages the value of the spare parts supplied with the machine and also the value of the swinging parts which had been removed and separately crated. There is no evidence that there is any market in such spares. Not many of these machines are manufactured. It would seem that the American parent company has discontinued production of that

model. In the whole of the plaintiff's African establishment, there was only one other such machine, in the Congo, Kinshasa, where there was no activity in the business for the moment. Just as the plaintiffs' machine had been supplied with parts, so it would be reasonable to presume that other machines would be similarly supplied. In those circumstances, I am satisfied that the spares and moveable parts should be assessed not at their book value, but at their scrap value like the rest of the machine.

I would assess the total damage at Shs. 139,399/60. The defendants are liable to make good two-thirds of that loss. There will be judgment, therefore, for the first plaintiff against both defendants in the sum of Shs. 92,933/-, less the scrap value of the machine including the spares and parts dismantled therefrom in preparation for transport. The defendants will pay interest on that net sum of seven per cent from November 1, 1965, to the date of judgment. There will be judgment for both defendants as regards the second plaintiff, with no order as to costs. The first defendant will pay the first plaintiff two-thirds of their taxed costs.

Order accordingly.

For the plaintiff:

S Kanji and FA Adamjee

Fraser Murray, Roden & Co, Dar-es-Salaam

For the defendants:

Byron Georgiadis and Manmohan Singh Shukla

George N Houry & Co, Dar-es-Salaam

Mohanlal Mathuradas & Brothers v East African Navigators Ltd [1968] 1 EA 186 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam

Date of judgment: 11 November 1967

Case Number: 14/1965 (36/68)

Before: Georges CJ

Sourced by: LawAfrica

[1] *Bailee – Carriage of goods – Bailee for reward – Standard of care – Goods lost after shipwreck.*

[2] *Carriage by sea – Carrier as bailee for reward – Shipwreck – Goods lost – Liability of carrier.*

[3] *Carriage by sea – Excepted perils – Onus on carrier to prove absence of negligence where goods lost through excepted peril – Carriage of Goods by Sea Act, Schedule, art. 4 (T.).*

[4] *Carriage by sea – Shipper – Whether shipper can sue for loss of goods in which he has no proprietary interest.*

[5] Practice – Pleading – Carriage by sea – Loss of goods by excepted peril – Whether negligence must be pleaded – Carriage of Goods by Sea Act, Schedule, art. 4 (T.).

Editor's Summary

The plaintiffs contracted with the defendants for the carriage of goods by sea from Dar-es-Salaam to a purchaser from the plaintiffs at Rufiji. The goods were shipped on the defendants' schooner subject to the terms and conditions of the Carriage by Sea Ordinance. On the voyage the schooner's engine broke down beyond repair and the schooner drifted aground on a rock on a rather deserted stretch of coast on Mafia Island. The crew left the boat deserted. No effective attempts to salvage or protect the goods were made by the defendants.

When a police party reached the shipwreck some people were found looting it. In the event the goods were lost, and the plaintiffs brought this action for damages. The defendants alleged (*inter alia*) (1) that the property in the goods had passed to the purchaser from the plaintiffs and that the purchaser alone therefore could sue; (2) negligence had not been pleaded; (3) the goods were lost through an excepted peril under the Schedule to the Carriage by Sea Act.

Held –

- (i) a shipper can sue in contract for failure to carry goods safely whether he has a proprietary interest in the goods or not (except where he has entered into the contract purely as agent for the real owner); therefore the plaintiffs, having entered into the contract as principals, could sue in this case although the property in the goods had passed to the purchaser;
- (ii) the defendants were bailees for reward and were under a duty to deliver the goods safely at destination;
- (iii) where damage arises or results from one of the causes set out in the exceptions in art. 4 of the Schedule to the Carriage by Sea Act (the onus of proving this being on the carrier) then the carrier is not responsible unless there has been a failure properly and carefully to load, handle, stow, carry, keep care for and discharge the goods carried;
- (iv) where the carrier brings himself within the exceptions then the responsibility rests on the plaintiff to show that some part of the damage arose because of the negligence of the carrier;
- (v) on the facts, the shipwreck occurred through the perils of the sea and matters within art. 4;
- (vi) but, there being no satisfactory evidence that the damage was caused by the shipwreck, the defendants had failed to discharge the onus on them of establishing that the damage to the plaintiffs' goods arose from a combination of a latent defect and perils of the sea;
- (vii) the goods were lost because they were abandoned, and the defendants had not discharged the onus on them of showing that the loss was not due to any fault or neglect on their part under exception 4 (2) (g);
- (viii) therefore the defendants were liable under the contract for the loss.

Judgment for the plaintiff.

Cases referred to in judgment:

- (1) *Fragano v. Long* (1825), B. & C. 219; 107 E.R. 1040.
- (2) *The Glendarroch*, [1894] P. 226.
- (3) *Gosse Millard v. Canadian Mercantile Marine*, [1927] 2 K.B. 432.
- (4) *Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton), Ltd.*, [1953] 2 Q.B. 295; [1953] 2 All E.R. 570.

Judgment

Georges CJ: In March, 1964, the Rufiji Co-operative Society ordered a quantity of goods from the

plaintiffs – a firm of general merchants and commission agents with headquarters at Kaludas Street, Dar-es-Salaam. The plaintiffs did not keep in stock a number of the items on the order, but the Society was a regular customer and, as was usual, they purchased such items as they did not keep, in order to supply.

The goods had to be shipped to the Society at Rufiji, and arrangements were made with the defendant company for their carriage by sea. There is a conflict of evidence as to whether the arrangements were made directly with Mr. Kawamba, the president of the Society, or with the plaintiffs. It may well be that Mr. Kawamba was present while shipping was being arranged, expediting

the despatch of the consignment, but I am satisfied that the contract was entered into between the plaintiffs and the defendants, and that it was to the plaintiffs that the defendants would have turned for their money had there been any difficulty about payment.

As far as that particular consignment was concerned, the plaintiffs had themselves to purchase most of the goods they supplied. They instructed their suppliers to deliver the goods direct to the wharf for shipment to Rufiji. There were in all 560 packages – 480 of which had been purchased for the purpose of meeting the order. The suppliers billed the plaintiffs, who in turn billed the Society, adding their profit.

It has been argued that the plaintiffs were acting merely as agents obtaining goods for their principals on their order. I find nothing in the evidence to support this argument. It is of significance that no flat percentage was added on to the bill for handling, as would have been expected if the situation was one of agency. On some items, e.g. sugar and rice, nothing at all has been added. On the milk, the mark-up is Shs. 2/- per case – amounting to a little under four per cent., while on the soap it is Shs. 2/- per bundle – amounting to a little over fourteen per cent.; on kerosene it is Shs. 1/50 per tin – amounting to nearly eighteen per cent.; on the biggest item, sembe, which totalled nearly half the bill, it was Shs. 2/- a bag – amounting to about three per cent. The practice was that the Society would not pay until they had received the goods. I find that the plaintiffs were vendors supplying goods to the Society as purchasers and that where they did not have the goods they were asked to supply, they procured them from outside.

The consignment was shipped on board the defendants' schooner, "Sukarimawe". The defendants on receipt of the goods issued the document which was admitted to evidence as P.3. It is in the form of a receipt and is signed by the captain of the ship. It is stated to be subject to the terms and conditions of the Carriage by Sea Ordinance, No. 6 of 1927. The agreed freight was Shs. 1,855/-. It was never in fact paid.

The "Sukarimawe" got into trouble on the journey. As the voyage had begun at nightfall, the course had been charted to pass east of Mafia. In daylight it is considered safe to navigate between Mafia and the mainland, but not at night. After passing a point called Nyosoro, the engine broke down. The engineer, Mr. Rizzan, testified that a bolt which secured the connecting rod bearing to the crankshaft had snapped. This caused a piston to come loose. The connecting rod was knocking against the sump, which developed a crack as a result and began leaking oil. The engine could not be repaired.

The seas were then running heavily and there were strong waves. The schooner was drifting ashore towards Mafia. Two anchors were dropped, but as the tide rose, the combination of high tide and high waves broke the chains and the schooner was lifted on to a rock.

There is a conflict of evidence as to whether the hull began to leak as a result of the running aground on the rock. Mr. Rizzan's evidence was that it did not and that when he left the hull was still sound and the vessel had sprung no leaks. There were waves breaking over the top, but that water was not reaching the hatches. The sarange, Mohamed Hamisi, gave a different story. He swore that the vessel struck the rock with great force and immediately developed a leak. Nothing could be done about it and specifically the engineer could do nothing because the leak was in the area where the cargo was stored. Getting at the leak would have meant moving the cargo. He seemed quite confused as to whether the captain and the engineer had been aware of the situation. In successive sentences he said that they were aware of the position before they left and that they were not aware of the position before they left. On this issue,

I prefer Mr. Rizzan's evidence to that of the sarange, and I find that the vessel did not spring a leak immediately on hitting the rock, though leaks may have sprung up as a result of the subsequent pounding.

The history of the matter after the shipwreck is somewhat confused. The captain ordered the crew to abandon ship. Hamisi's evidence was that there were ten people in all on the ship, and after much difficulty they were all taken ashore by boat in two trips – six on the first trip and four on the second. The wreck had taken place on a rather deserted stretch of coast, and the captain and Mr. Rizzan set out immediately on reaching shore to see what help could be summoned. He says that they walked for some ten hours till they reached a village called Kirogwe, where they caught a bus which took them to Kilindoni, the principal village.

It was then too late for any effective action, and next morning they reported the wreck to the port officer and the police. Eventually, they got a telephone message to the owner, Mr. Fidahusseini. They also hired a "Land Rover" which could drive to within 1 to 1½ hour's walking distance of the place where the vessel had been wrecked. In this way, they despatched food to the members of the crew left on the spot, though the engineer himself did not visit the wreck. He speaks of the captain having gone to see his ship, but I am not on the whole inclined to think that he returned to the spot.

Mr. Fidahusseini flew to Mafia to see what could be done. He states that the police were unable to make available constables who could help watch the wreck. Inspector Isaya says that men were available. The problem was transport to get them to the spot. Mr. Fidahusseini states that he found it quite impossible to organize a salvage. Schooners did not want to venture into the area. A dhow did make one trip for what was described as a very high price. A car and a few tyres were salvaged, but no more. I am satisfied that he did make the offer to pay the crew extra money to remain at the area of the wreck, but that they did not wish to. It was clearly a desolate area, and they could see no point in remaining there.

I do not accept Hamisi's evidence that they were threatened by a gang with pangas and that they fled in order to save their lives. This is, at the kindest, a dramatization of the events. When the Inspector reached the spot with his party, he found eleven persons looting goods from the ship. None of these people was armed. They were arrested, charged and convicted of stealing. There was no obvious organisation about the operation – but merely individuals helping themselves to what was going. The Inspector thought that at that time there would have been perhaps one hundred to three hundred bags in the hold – all damaged by water. The isolation of the area can be gauged from the fact that after driving from Kilindoni, the police walked thirty miles to the scene, ten miles through bush. All the arrested people were local persons. On the factual issue, therefore, I find that the alleged attack pleaded in para. 7 of the written statement of defence has not been established, and that the thieves did not steal the majority of the cargo from the schooner, including the 560 packages of the plaintiffs.

The plaintiffs' claim against the defendants is for damages for the loss of their goods. The claim is based on breach of contract to carry the goods safely to Ndundu, or in the alternative breach of the terms of the contract of carriage set out in the bill of lading dated March 23, 1964. This is the document admitted into evidence as P.3, but which is not admitted by the defendants to be a bill of lading.

Various legal arguments have been advanced in answer to this claim which must now be examined. It has been urged in the first place that the plaintiffs were merely agents – purchasing goods on behalf of the Society and arranging to have them despatched. As I have indicated, there is no factual basis for

this argument. I am satisfied that the relationship was a vendor-purchaser relationship and not a principal-agent relationship.

On the basis that the relationship was a vendor-purchaser relationship, it is urged that the property in the goods had passed to the Society – the purchasers – at latest when the goods were placed on the “Sukarimawe” for despatch to Ndundu, and that they and they alone have a proprietary interest in the goods on which an action for damages to them can be based.

In *Scrutton on Charter Parties and Bills of Lading* (16th Edn., 1955), p. 285, it is made clear that an action for a failure to carry goods safely may be founded either in tort or in contract. This claim is founded in contract. The persons who are entitled to sue in contract are:

- “II. (1) The shipper, unless he acted merely as an agent for another, in which case the principal can sue and the agent cannot, except where he makes a special contract in his own name with the shipowner.
- “(2) Any person to whom by indorsement and delivery of the bill of lading, or by indorsement followed by delivery of the goods, the absolute property in the goods has passed.
- “(3) The consignee named in the bill of lading if the property has passed to him by such consignment.”

It is argued that group (1) must be subject to the overriding condition that the property in the goods be in him. The basis of the argument clearly is this: If the property has passed to the purchaser, then there is always recourse against him for the price, and then he, as a person with a proprietary interest in the goods, could sue the carrier in tort, whether or not his name is mentioned in the bill of lading.

I cannot accept the argument. The only limitation to the right of the shipper to sue is the limitation set out in the text, i.e. where he has entered into the contract purely as an agent for the real owner. Had it been intended to limit his right only to cases where he had a proprietary interest, this would have been clearly stated.

There is support for that position in *Carver’s Carriage of Goods by Sea* (10th Edn., 1957), pp. 42–43. The learned author states:

“When goods are delivered to a carrier to be carried without any special contract being made, the right to sue for a breach of duty on the carrier’s part appears to be in the person to whom the goods belonged at the time of the bailment or who is to bear the risk of the transit.”

This would appear to be the position where the claim is based in tort. The author continues:

“If the actual sender is acting on the owner’s instructions, the latter is regarded as the contracting party and he becomes entitled to sue for the goods and is liable to pay the freight and otherwise to perform the implied contract.

“But when a special contract is made with the carrier, its terms must be looked at; and if it appears that the shipper was himself the contracting party, he is the person able to sue and liable upon the contract, *although he may have been acting for the benefit of another and may have no interest in the goods.*”

This quotation confirms the interpretation that the category II (1) set out in *Scrutton*, op cit., is not subject to the limitation that the shipper must have the property in the goods.

The evidence in this case on the issue as to whether the property had passed or not is not comprehensive. I would be inclined to think it had. Goods had been ordered by description and goods of that description had been appropriated in fulfilment of the contract and despatched. There was nothing in the receipt, P.3, to show that the goods were intended for the Rufiji Society, and it could be argued that they were held throughout at the plaintiff's order, so that the property was still in them. I do not think that was the intention. I would hold that the property had passed, but in the circumstances of this case, this would be immaterial, as a special contract had been entered with the shippers, as evidenced by the receipt, P.3. That contract was not entered into with them as agents for anyone, but with themselves as principals, and for breach of that contract they can sue.

Much stress was laid on *Fragano v. Long* ((1825), B. & C. 219). I think, with respect, that the case is not really relevant here. In that case, the vendors, Mason & Co., clearly acted throughout as agents for the purchasers when they despatched the goods from Birmingham to Naples. They took out an insurance policy in which they declared the interest in the goods to be in the purchasers. It was held that the purchasers could sue the carriers for non-delivery. The judgment of Bayley, J., is, however, significant. He states:

“At Liverpool, Stokes & Co., Mason's shipping agents, shipped the goods and took a receipt. It is said that the agent was thereby enabled to maintain an action for the goods but that Frangano as his principal could not. I think that position is not correct, although there might have been some difficulty had Stokes & Co. set up an adverse interest.”

The case thus establishes the right of the person with the proprietary interest to sue. It does not dispose of the right of the person who has entered into the contract. In this case, the contract was not made with the plaintiffs as agents, but as principals, and accordingly, I am satisfied that they can sue for its breach. Counsel for the defendant has argued that the pleadings disclose no special contract, nor does the evidence. Paragraph 5 of the plaint refers specifically to:

“a breach by the defendant of the terms of a contract of carriage contained in a bill of lading issued by the defendant to the plaintiffs and dated March 23, 1964, whereby the defendant contracted with the plaintiffs to carry the said goods . . . from Dar-es-Salaam to Ndundu.”

This is the document tendered in evidence and marked P.3.

There may be argument as to whether or not the document is a bill of lading. There can be no doubt that it is a contract for carriage, subject to the terms and conditions of the Carriage by Sea Ordinance, No. 6 of 1927, and it is a contract between the plaintiffs and the defendants. Accordingly, I find that the plaintiffs' right to sue has been established.

There remains the question as to whether the defendants are at all liable in the circumstances of this case.

When the matter was first down for hearing before Hamlyn, J., one of the issues agreed between the plaintiffs and the defendants was whether or not the defendants were common carriers. On an examination of the plaint, it is clear that there is no averment that the defendants were common carriers. The only averment is that the defendants were at all material times the owners of the “Sukarimawe” and that they “used the said vessel for carriage of goods by sea for reward”.

The first paragraph of the written statement of defence, however, reads:

“Paragraphs 1, 2 and 3 of the plaint are admitted, save that the defendant denies that it is a common carrier of goods for reward.”

There is thus a specific denial of something which has not been averred. There was argument as to whether, despite the pleadings, the matter had become an issue by consent of the parties.

I do not think a decision on this argument is necessary. In any case, there was no evidence whatsoever that the defendants were common carriers. It would have been the duty of the plaintiffs to lead such evidence, and they did not do so. Liability must be decided on the basis that the defendants are not common carriers.

The plaintiffs were, however, bailees for reward of the goods which made up their consignment and they were under a duty to deliver the goods safely at destination. It is conceded that they failed to do so. The question is whether the failure was a breach of contract or whether they were excused under the provisions of art. 4 of the Schedule to the Carriage of Goods by Sea Act, Cap. 164.

There has been much discussion on the form of the pleadings in regard to that issue. The defendants contend that having pleaded that the loss was occasioned by an excepted peril under art. 4, the onus then shifted on to the plaintiffs to prove negligence in order to take the case out of the exception. Since there had been no reply to the written statement of defence specifically raising the question of negligence, that matter could not at all be considered.

This contention is in line with the decision in *The Glendarroch* ([1894] P. 286).

The principle there is stated thus:

“The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course, they fail. The defendant’s answer is ‘Yes, but the case was brought within the exception within its ordinary meaning’. That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, viz. that the damage was brought about by the negligence of the defendants’ servants, and it seems to me that it is for the plaintiffs to make out that second exception.”

If it is for the plaintiffs to make out that second exception, then it is for them to plead it by way of reply.

The position is also discussed in Carver, op cit., p. 185. *The Glendarroch* (*supra*) is there quoted as setting out the law correctly. The author discusses a dictum of Wright, J., as he then was, in *Gosse Millard v. Canadian Mercantile Marine* ([1927] 2 K.B. at p. 436), laying down, in effect, that if the goods owner proves that the goods shipped have not been delivered or have been damaged after shipment, then the carrier is liable unless he can prove affirmatively; (i) that he has taken reasonable care of the goods while they were in his custody, and (ii) that the loss or damage falls within one of the immunities specified in art. 4, r. 2.

This dictum, he points out, has been followed in a number of cases at first instance. Indeed, it was set out as the law in Carver (9th Edn.), p. 185, and quoted with approval by Pilcher, J., in *Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton), Ltd.* ([1953] 2 Q.B. at p. 303).

The matter is one of some difficulty. Article 3 (2) of the Schedule to the Carriage of Goods by Sea Act states:

“Subject to the provisions of art. 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.”

This is the primary obligation, and it is subject to the exceptions in art. 4. I would agree, therefore, that where damage arises or results from one of the exceptions, the carrier is not responsible, unless there has been a failure properly and carefully to load, handle, stow, carry, keep, care for and discharge the goods

carried. On the other hand, it is the duty of the carrier to prove that the damage arose from a cause set out in the exception. Where he fails to prove this, then the onus must remain on him to show that he has used reasonable care because this, after all, is the basis of the liability of the bailee of goods. Where he has established *prima facie* that the damage arose from a cause set out in art. 4, then the responsibility rests on the plaintiff to show that some part of the damage arose because of the negligence of the carrier.

The first problem, therefore, is to ascertain on the facts in this case whether the loss occurred through the perils of the sea. On the evidence, I accept that the shipwreck occurred because of the latent defect in the bolt which snapped, causing the engine to fail, and the rough seas which forced the ship on to the rocks. These are matters which clearly fall under art. 4 (2) (c) and (g). In the case of latent defects, it is necessary for the defendant to establish that the defect was not discoverable with due diligence. There is adequate evidence that the engine had been properly maintained and indeed recently overhauled.

On the other hand, there is no satisfactory evidence that the damage to the goods was caused principally by the shipwreck. The evidence of Mr. Rizzan was that the ship was not leaking when he left it. Hamisi says that it was. The extent of the leak is not made clear, but Hamisi describes the hole as two inches by three inches.

Mr. Rizzan never went back to the ship, and Hamisi, as I have indicated, is not a particularly reliable witness. He stated that he had stayed on the shore watching the goods and the ship for over twenty days. Mr. Rizzan is clear that after seven or eight days Hamisi and the crew refused to stay further because they had been threatened. Hamisi's evidence is that he visited the ship every day while he was camped on the shore. In answer to counsel for the defendant, he stated that some six hundred bags of the cargo remained after the robbery had taken place, and "some of the goods had already received damage and others had been tampered with by some people". Inspector Isaya was also vague. He says:

"In fact, the only things I saw in the ship were foodstuffs spoiled by water. Some books. Some exercise books. They were useless."

He estimated the number of bags as one hundred to three hundred. By then, the hatches had been opened. It is impossible, therefore, to say whether the water damage was due to any leak caused by hitting the rock or to the entry of water through the open hatches.

It is significant that in their pleadings, the defendants do not state that the shipwreck was the principal cause of the damage. They rely on the theft.

I am of the view, therefore, that the defendants have not discharged the onus which rested on them of establishing that the damage to the plaintiffs' goods arose from a combination of a latent defect in the engine and perils of the sea.

There remains exception (2) (g), i.e. damage arising or resulting from:

"any other cause arising without the actual fault or privity or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be upon the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

The language makes it clear that the carrier must show that there was no negligence on his part if he is to have the benefit of this exception.

Fundamentally, the goods in this case were lost because they were abandoned. As I have already indicated, I do not accept that any armed body of robbers

attacked the crew while they kept watch. There is no satisfactory evidence either that the bulk of the cargo was stolen. If Hamisi is to be believed, it would be quite extraordinary for a band of robbers with no mechanical means of transport to have moved the bulk of the cargo overnight and to have carried it so safely away that it could not have been recovered. If it were all that simple, then a properly mounted salvage operation could not but have succeeded. Mr. Fidahussein tells us that a car and some tyres were salvaged in a dhow. When that was done is not clear as there is no evidence from Hamisi on the point.

Mr. Fidahussein states that he was unable to make any arrangements for salvage. He says he offered as high a price as Shs. 2,500/- for each dhow load of cargo salvaged, but that only one dhow load was salvaged because of the difficulty of reaching the vessel. I would not wish to say that I do not believe Mr. Fidahussein, but the position is that there is no evidence whatsoever to confirm his statements that he made these unsuccessful efforts.

For example, he says on his first trip he decided after consultation with Mr. Rizzan that the only way to get the schooner off the rocks was to lighten her by removing her cargo. Inspector Isaya's evidence was that even at high tide, it was possible to reach the ship from the land. The crew on the spot could, therefore, have been used while they waited to unload some of the cargo and stack it on shore in case it became possible to transport it, while at the same time lightening the ship in the hope of refloating it. There is no evidence that any such effort was made.

Again, Mr. Fidahussein tells us of the difficulty of getting to the spot by sea. The fact is that he never paid a visit to the area. He flew over it and no more. It would have been possible to have at least one dhow owner, perhaps the one who successfully moved the car and the tyres, to give first-hand evidence of the navigational hazards of the sea approach to the wreck. Salvaging a car from a wreck on to a dhow impresses me as a more difficult operation than salvaging tins of oil and kerosene and bags of maize flour and flour. If the one could be done, it is difficult to understand why the other could not.

Mr. Fidahussein reports that the port authorities were reluctant to help, that other schooner owners – only one of whom is mentioned by name – said that the case was hopeless because the place was full of rocks. We do not even know the names of the dhow owners whom he tried to induce to help in the salvage. On this evidence, I am unable to find that he has discharged the onus upon him of showing that he did all that could reasonably be done to salvage the cargo after the wreck.

I am satisfied that seven or eight days after the shipwreck, the vessel was abandoned. During that time, no effort was made to lift the cargo ashore and explore the possibilities of having it moved. The kerosene, the cotton seed oil and quite likely the milk would most probably have been in usable condition. We do not even know what happened to them. When the Inspector arrived, he saw nothing but bags in the hold.

The cargo was lost because it was abandoned. To bring the case under exception 4 (2) (g), the carrier must show that the loss was not due to any fault or neglect on his part. He has not discharged this onus. Accordingly, he cannot claim the benefit of the exception.

Since the defendant has not brought the damage within any of the exceptions set out in art. 4 (2), then, in my opinion, he is liable under the contract for the loss.

I accept that the document P.3 correctly sets out the goods which the defendants received for shipment or the "Sukarimawe" on behalf of the plaintiffs.

I accept the prices set out in invoice 196/64 in exhibit P.2 as the correct value of these items. The total is Shs. 25, 750/50.

The plaintiffs shall have judgment for that sum with costs.

Judgment for the plaintiff.

For the plaintiff:

I Peera

Donaldson & Wood, Dar-es-Salaam

For the defendant:

AA Lakha

Fraser Murray, Roden & Co, Dar-es-Salaam

Kionywaki v Republic **[1968] 1 EA 195 (HCT)**

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	6 November 1967
Case Number:	714/1967 (45/68)
Before:	Biron J
Sourced by:	LawAfrica

[1] *Criminal Law – Arrest – Justice of the peace – Powers of, in Tanzania – Magistrates’ Courts Act 1963, ss. 47 and 48 (T.).*

[2] *Criminal Law – Judicial officer – Immunity of – Justice of the peace wrongfully ordering arrest – Whether protected – Whether exercising judicial function – Whether immunity from civil process is also immunity from criminal process – Penal Code, s. 16; Magistrates’ Courts Act 1963, s. 60 (T.).*

[3] *Criminal Law – Wrongful confinement – Appellant ordering complainant to attend and assist in self-help scheme – Complainant refused – Appellant as justice of the peace had complainant arrested and handcuffed – Magistrates’ Courts Act 1963, ss. 47 and 48; Penal Code, ss. 89C (1) and 253 (T.).*

Editor’s Summary

The appellant, in his capacity as a divisional executive officer, ordered the complainant to attend and assist in a self-help scheme. The complainant refused, and also declined to attend the local primary court. The appellant thereupon, in his capacity as a justice of the peace, had a warrant of arrest prepared and subsequently arrested and handcuffed the complainant on a charge contrary to s. 89C (1) of the Penal

Code (which deals with dissuasion of persons from assisting in a self-help scheme). The appellant was later charged with and convicted of wrongful confinement contrary to s. 253 of the Penal Code, the trial magistrate finding that the arrest was wrongful. The appellant appealed to the High Court, where the appellant raised an issue about his immunity from prosecution as a judicial officer performing a judicial function in arresting the complainant.

Held –

- (i) the arrest was unjustified and unlawful because the complainant had not committed any offence contrary to s. 89C (1) of the Penal Code;
- (ii) the appellant, however, could claim the protection afforded to a justice by the Magistrates Courts Act, s. 60; for although the immunity expressly conferred by that section is in respect of civil process and liability, if an individual is exempted from civil process or liability in respect of a particular act he is immune from criminal process for such act.

Observation obiter on the construction and applicability of the immunity conferred upon judicial officers by the Penal Code, s. 16.

Appeal allowed.

Cases referred to in judgment:

- (1) *Chunder Narain v. Brijo Bullub* (1874), 14 Beng. L.R. 254.
- (2) *Tozer v. Child* (1857), 7 E. & B. 377; 119 E.R. 1286.
- (3) *Ashby v. White* (1703), 1 Bro. Parl. Cas. 62; 1 E.R. 417.
- (4) *Calder v. Halket* (1839–40), 2 Moo. Ind. App. 293; 13 E.R. 12, P.C.

Judgment

Biron J: The appellant was convicted of wrongful confinement and he was sentenced to imprisonment for six months. He was also ordered to pay to the complainant Shs. 136/- “plus Shs. 1,420/-” compensation. He is now appealing.

The facts as found by the trial court, which are supported by the evidence, can briefly be summarised as follows. The appellant was, at the material time, a divisional executive officer, and in such capacity he ordered the complainant to attend and assist in the self-help scheme, the construction of a clinic in the area. The complainant refused. The appellant sent a special constable to the complainant, ordering him to attend the local primary court. The complainant declined. The appellant thereupon, in his capacity as a justice of the peace, ordered the clerk of the court to prepare a warrant of arrest for the apprehension of the appellant on a charge contrary to s. 89C (1) of the Penal Code. The appellant accompanied the special constable and a court messenger who went to arrest the complainant, whom they met on the road. The complainant was ordered to go to the primary court and on his refusing, they proceeded to arrest him and he was handcuffed. Apparently whilst on the way to the primary court, they were met by an uncle of the complainant, who threatened them with a spear. The appellant and the special constable fled, leaving the complainant at the scene together with the messenger. The complainant eventually found his way home, but the handcuffs were not removed until some twenty hours later. The complainant in his evidence stated that at the time he was apprehended and handcuffed he was wearing a wristlet watch and that he had in his pocket Shs. 1,000/- in cash, and he was also carrying in a bag Shs. 434/-. The appellant’s defence was to the effect that he had every right in his capacity as a justice of the peace to order the arrest of the complainant on a charge under s. 89C (1) of the Penal Code.

In his judgment the learned magistrate set out in full the provisions of ss. 47 and 48 of the Magistrates’ Courts Act 1963, which lay down the powers of justice of the peace, and which read:

“47. A justice may arrest, or may order any person to arrest, any person who in his view commits a cognizable offence.

“48(1) Where a complaint of facts which constitute an offence is made, either orally or in writing, to a justice, he shall examine the complainant and, if satisfied that there are sufficient grounds for so doing, issue a summons or a warrant for the purpose of compelling the appearance of the person accused:

“Provided that a justice shall not, in the first instance, issue a warrant for the arrest of the person accused, unless he is satisfied that it is proper that such person should be detained in custody pending his trial or should give security for his appearance, or that the circumstances of the case render it unlikely that such person will appear in answer to a summons.

“(2) The power to issue a warrant under this section includes power to issue a warrant of arrest authorising a police officer to whom it is directed

to release the person accused on his executing a bond for a specified sum with or without sureties, for his appearance before the court.

- “(3) Every summons and warrant issued under this section shall be in the prescribed form and shall be returnable before a magistrate’s court at a court house in accordance with the directions of the appropriate judicial authority.
- “(4) Where a justice considers a complaint under this section, he shall enter the same, together with his decision whether or not to issue process, in the records and registers of the court house to which he is assigned; and if he issues process, he shall enter the charge in the register.”

The learned magistrate then went on to find, and with respect, very rightly so, that the complainant had not committed a cognizable offence in the view of the appellant. He also found after due consideration that the complainant had not committed any offence contrary to s. 89C (1) of the Penal Code, in respect of which the appellant had issued the warrant of arrest, and which section reads:

“Any person who, with intent to impede, obstruct, prevent or defeat any self-help scheme approved by the regional commissioner or the area commissioner or any self-help scheme of a type approved by the regional commissioner or the area commissioner, dissuades or attempts to dissuade any person from offering his services, or from assisting, in connection therewith, shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand shillings, or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.”

The learned magistrate thereupon found as a fact that there being no justification for the issue of a warrant of arrest, the arrest was unlawful, as was the handcuffing of the complainant in effecting the arrest, which comprehensively constituted wrongful confinement. He accordingly convicted the appellant as charged.

The grounds of appeal as set out in the petition of appeal, drawn up by learned counsel, are that:

- “2. The learned district magistrate has erred in convicting the appellant of the offence of wrongful confinement against the weight of the evidence or insufficient evidence to substantiate the same.
- “3. The learned district magistrate has erred in law in convicting the accused under s. 253 of the Penal Code.
- “4. The learned district magistrate has failed to take into consideration that the accused was a justice of peace and as such had a power to issue the warrant of arrest.
- “5. The learned district magistrate has erred in not holding that Juma Yusufu Mkulape had an intention to impede or to obstruct or to defeat the self-help scheme.
- “6. The action against the accused is illegal.”

I do not consider it necessary to deal with the grounds raised in detail, as it is, to my mind, abundantly clear that the complainant had not committed any offence contrary to s. 89C (1) of the Penal Code. The arrest was therefore unjustified and so unlawful, as was the consequent confinement. With respect, I fully agree with the learned magistrate’s findings on the facts and in law, in so far as they go. The issue before this Court, however, is whether they go far enough.

In arguing this appeal on behalf of the appellant, counsel for the first time raised the defences conferring immunity on judicial officers acting in their judicial capacity provided for by s. 16 of the Penal Code and s. 60 of the Magistrates' Courts Act 1963, which respectively read:

"Section 16 of the Penal Code.

"16. Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions, although the act done is in excess of his judicial authority or although he is bound to do the act omitted to be done."

"Section 60 of the Magistrates' Courts Act 1963.

"60 (1) No

(a) magistrate holding a magistrate's court shall be liable to be sued in any court for any act done or ordered to be done by him in the exercise of his judicial duty;

(b) justice shall be liable to be sued in any court for any act done or ordered to be done by him in the exercise of his functions or duty as a justice,

whether or not such act is within the limits of his or the court's jurisdiction, if at the time of doing such act or making such order he believed in good faith that he had jurisdiction to do so such act or make such order.

"(2) No officer of a magistrate's court or other person required to execute the lawful orders of a magistrate or justice shall be liable to be sued in any court for the execution of any order issued or made by a magistrate or justice if he believed in good faith that the order was within the jurisdiction of the magistrate or justice by whom it was issued."

Neither a judicial officer nor what constitutes a judicial function within the meaning of s. 16 of the Penal Code, is anywhere defined. A judicial proceeding is defined in s. 5 of the Penal Code as amended in the Sixth Schedule to the Magistrates' Courts Act, Part II, as:

" 'judicial proceeding' includes any proceeding had or taken in or before any court, and any proceeding had or taken in or before any tribunal, commission or person in which or before whom evidence may be taken on oath."

This definition is not of any assistance in determining what constitutes a judicial function, let alone who is a judicial officer.

It is, I think, indisputable that the immunity conferred on judicial officers for judicial acts or functions performed by them, is in respect of the act, and not, as it were, creating the actors a privileged class immune from court process. In this connection it is not irrelevant to quote from Ratanlal and Thakore's commentary on s. 77 of the Indian Penal Code in *The Law of Crimes* (14th Edn.), p. 147. Section 77 of the Indian Penal Code reads:

"Nothing is an offence which is done by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law."

This is followed by:

"Comment

"This section protects judges from criminal process just as the Judicial Officers' Protection Act saves them from civil suits. Section 1 of that Act says:

“ ‘No judge, magistrate, justice of the peace, collector or other person acting judicially shall be liable to be sued in any civil court, for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of.’

“The exception in this section is in favour of a judge only; whereas the Judicial Officers’ Protection Act protects every ‘judge, magistrate, justice of the peace, collector or other person acting judicially’.

“Under this section a judge is exempted not only in those cases in which he proceeds irregularly in the exercise of a power which the law gives him, but also in cases where he in good faith exceeds his jurisdiction and has no lawful powers.

“In a Calcutta case (*Chunder Narain v. Brijobullob* (1874), 14 Beng. L.R. 254, 257), Markby, J., said:

“ ‘The duties which he (a magistrate) usually performs are of such a nature as to render it absolutely necessary for their due performance that he should have that protection. He has generally either to punish an offence or to vindicate the rights of a private individual; and if he were hampered by fear of the consequences which might arise from a mistaken conclusion, he could not have that independence of mind which is essential to the discharge of such functions as these. This protection is not confined to persons holding and exercising a regular judicial office, but it extends to any persons whose duty it is to adjudicate upon the rights or punish the misconduct of any given person, whatever form their proceedings may take, or however informal they may be. This has been so held in England and I do not see any reason to doubt that the same would be held here’.”

The underlining in the passage quoted is mine and it confirms that the protection afforded a particular act extends to any person whose function it is, or who is authorised, to perform such act. irrespective of what official position he may hold. In respect of this proposition it is particularly pertinent to quote the authority cited for the statement that this is the law in England. The case cited is that of *Tozer v. Child* ((1857), 7 E. & B. 377) where it was held, quoting from the headnote:

“An action does not lie against a churchwarden presiding (under stat. 18 & 19 Vict. c. 120), at the election of vestrymen and auditors, for refusing the vote of a party entitled to vote for vestrymen and auditors, or for refusing to allow as a candidate a party entitled to be candidate, unless malice be alleged and proved.”

The churchwarden’s act was in that case held to be a judicial function. It is also not without interest to quote a passage from the judgment in the case of *Ashby v. White* ((1703), 1 Bro. Parl. Cas. 62) recited in the judgment, the passage reading:

“The returning officer is to a certain degree a ministerial one, but he is not so to all intents and purposes; neither is he wholly a judicial officer, his duties are neither entirely ministerial nor wholly judicial, they are of mixed nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever in the admission or rejection of votes; the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension, if, in consequence of a mistake, he became liable to an action.”

If, as is evident from the authorities cited, the nature of the act is the criterion and not the status or position of the actor, then to my mind, an official, whatever his substantive or regular position may be, whose function it is, or who is authorised, to perform some act, in so far as the performance of that act is concerned, i.e., qua that act, if such act constitutes a judicial function, he, in the performance of such act and qua that act, is a judicial officer. In simple terms, the nature of the act determines the character of the actor. The reasoning may be somewhat circuitous, but is, in my judgment, sound.

As remarked, a judicial function within the meaning of s. 16 of the Penal Code is nowhere defined, but there is authority to the point. Again, citing Ratanlal and Thakore on s. 77 of the Indian Penal Code, it is stated at p. 148:

“The word ‘judicial’ has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind – i.e., a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in court, and they also act judicially when determining in their private room what is right and fair in some administrative matter brought before them, as, for instance, levying a rate. It is not merely in respect of acts in court, acts *sedente curia*, that a judge has an immunity, but in respect of all acts of a judicial nature. An order under the seal of a criminal court to bring a native in that court, to be there dealt with on a criminal charge, is an act of a judicial nature, and whether there was any irregularity or error in it, or not, would be dispunishable by ordinary process at law. If it be once established that the act in question emanated from, and was appropriate to, the legal duties of the office of a judge, it must stand as an act purely judicial. Whether such act be done by the judge in chamber or *sedente curia*, the privileges connected with the duties of the judge’s situation, and which are given for the public safety and advantage, in which the security and independence of the judge are interwoven, must necessarily await upon such acts, as if they are judicial.”

The authority for that statement is the case of *Calder v. Halket* ((1839–40, 2 Moo. Ind. App. 293), the headnote to which reads:

“The 21st Geo. III c. 70, s. 24, protecting provincial magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial offices, does not confer unlimited protection, but places them on the same footing as those of English courts of a similar jurisdiction, and only gives them an exemption from liability when acting *bona fide* in cases in which they have mistakenly acted without jurisdiction (*ibid.* at pp. 306 – 307).

Trespass will not lie against a judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the plaintiff, in every such case, to prove that fact (*ibid.* at p. 309).”

In that case the magistrate issued a warrant for the arrest of a Mr. Halket. In so doing he acted in excess of jurisdiction, his jurisdiction being limited to natives, whereas Mr. Halket was a European subject of the British Crown and therefore outside the jurisdiction of the magistrate in question. The court however found that the magistrate had no information or reason to believe that Mr. Halket was a European subject of British descent, and therefore it had not been established that he had not acted in good faith. Accordingly, his action

in ordering the arrest of Mr. Halket was held to be “dispunishable by ordinary process at law”.

There is thus authority to the effect that in issuing the warrant of arrest the appellant was performing a judicial function, and as he was empowered and authorised to issue warrants of arrest he, in respect of and qua that act, could be held to be a judicial officer within the meaning of s. 16 of the Penal Code and therefore immune from criminal process, although he acted without jurisdiction.

As will be noted, s. 16 of our Penal Code is much wider than the corresponding provisions of s. 77 of the Indian Code, whereunder the section is limited to judges and only when acting in good faith, whereas under the provisions of our Code the immunity is conferred on any judicial officer and is unqualified. I must confess that as our section would appear to be founded on, and derived from, the corresponding section in the Indian Code, I fail to see why it was thought fit to confer unqualified immunity on such a wide range of persons. Forbearing to lay down a firm ruling on the construction of this section and its applicability to this instant case, I propose to consider the position under s. 60 of the Magistrates’ Courts Act, whereunder the law is much clearer. In fact the law is express and straightforward, that as laid down in para. (b) of sub-s. (1):

“(No) justice shall be liable to be sued in any court for any act done or ordered to be done by him in the exercise of his functions or duty as a justice, whether or not such act is within the limits of his or the court’s jurisdiction, if at the time of doing such act or making such order he believed in good faith that he had jurisdiction to do such act or make such order.”

The appellant would thus be protected by this section, subject to what follows hereinafter, provided “he believed in good faith that he had jurisdiction” to order the complainant’s arrest. This aspect of the case was never considered by the learned magistrate. It is therefore incumbent on this Court now so to do.

Although, in fairness to the complainant, he had been excused from attending the self-help scheme on that particular day by the ten cell leader, because he had put in work on previous Sundays, this was not known to the appellant. Nor, for that matter, did the complainant even take the trouble to so inform the appellant when he declined to participate in the self-help scheme. Although, as found by the learned magistrate, with whom, with respect, I have agreed, a refusal to participate in a self-help scheme does not constitute an offence under s. 89C of the Penal Code, and this I think would be clear to any lawyer or even a law student, the appellant is neither, nor even a professional man. It is quite possible that he may have genuinely believed that a refusal to participate in a self-help scheme does impede such scheme; and strictly speaking, there could be some substance in such argument, as the withholding of one’s labour does in a measure impede the progress, by prolonging the work (although the substantive element of the offence is the “dissuading” or “attempting to dissuade” others from participating, as would be obvious to any lawyer).

Before issuing the warrant of arrest the appellant and himself requested the complainant to participate in the scheme and had even asked him his reason for refusing, and the only reason the complainant apparently gave was that he was otherwise engaged. Further, the appellant, before issuing the warrant of arrest, did in fact send a messenger to the complainant telling him to attend at the primary court.

As noted, this aspect of the appellant acting in good faith was never considered by the trial court, and, as conceded by learned counsel for the respondent, it is impossible to say that had the learned magistrate considered such aspect he would necessarily have found that the appellant was not acting in good faith. Nor, in all the circumstances of the case, could this Court now so hold.

The immunity expressly conferred by this section (s. 60 of the Magistrates' Courts Act), without going into too technical detail, is in respect of civil process and liability. It is not without interest to note that the section is, doubtless, founded on the corresponding provisions in the Indian Judicial Officers' Protection Act 1850 (referred to in the passage from Ratanlal and Thakore's commentary on s. 77 of the Indian Penal Code), which reads:

"No judge, Magistrate, justice of the peace, collector or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any court or other person, bound to execute the lawful warrants or orders of any such judge, magistrate, justice of the peace, collector or other person acting judicially shall be liable to be sued in any civil court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

However, to my mind, and as, I think, conceded by learned counsel for the respondent, if an individual is exempted from civil process or liability in respect of a particular act, a fortiori he is immune from criminal process for such act. To hold otherwise would in my judgment make neither law nor sense. I therefore so propose to hold and rule that the appellant in this instant case can claim the protection afforded by s. 60 of the Magistrates' Courts Act 1963.

In view of my finding and ruling on s. 60 of the Magistrates' Courts Act, I am, and I must confess not without relief, spared from making a firm finding and ruling on the construction and applicability of s. 16 of the Penal Code to this instant case. As indicated, I consider the unqualified immunity thereby conferred far too large a protective and all embracing umbrella, which could cover a multitude of abuses of power, particularly in view of the present tendency to confer and extend the powers of ever growing classes of officials. I think it is a matter for the legislature to concern itself with, unless I am, as I must confess I hope I am, mistaken in my construction of the section.

In the result, the appeal is allowed, the conviction is quashed, and the sentence imposed thereon is set aside, as is the order for compensation. In respect of such order I cannot forbear from expressing my surprise as to how it was arrived at, particularly in view of the fact that evidence was adduced before the court to the effect that the wristlet watch and the bag containing Shs. 434/-, the property of the complainant, were recovered and produced at the primary court.

Appeal allowed.

For the appellant:

NP Patel

NP Patel, Dar-es-Salaam

For the respondent:

SN Laxman (State Attorney, Tanzania)

Attorney-General, Tanzania

Division: High Court of Tanzania at Dar-Es-Salaam
Date of judgment: 8 November 1967
Case Number: 131/1967 (48/68)
Before: Biron J
Sourced by: LawAfrica

[1] *Criminal law – Grievous harm – Doing grievous harm – Accused chasing complainant who falls and breaks a leg – Whether accused can be convicted where harm caused indirectly – Penal Code, s. 225 (T.).*

Editor’s Summary

The accused first assaulted the complainant and then chased him with a knife. Whilst running away from the accused the complainant tried to jump over a furrow but fell and broke his leg. The accused left him lying semi-conscious. Eventually the complainant was found and taken to hospital, where he spent five months and had his leg amputated. The accused was convicted of doing grievous bodily harm. On revision a question was raised as to whether the conviction could be supported when the injury to the complainant was not caused directly by the accused.

Held – the conviction was proper (*R. v. Halliday* (2) applied).

Cases referred to in judgment:

- (1) *Thabo Meli v. R.*, [1954] 1 All E.R. 373; [1954] 1 W.L.R. 228.
- (2) *R. v. Halliday* (1889), 61 L.T. 701.

Judgment

Biron J: The accused was convicted in the district court of Mbeya of doing grievous harm and he was sentenced to imprisonment for three years, which sentence requires confirmation by this court. On the case coming before one of my learned brothers for confirmation of the sentence, he doubted whether the conviction could stand and accordingly transmitted the proceedings to the Director of Public Prosecutions, enquiring whether he wished to be heard in support of the conviction. The learned Director intimated that he did wish to be heard. Hence these proceedings in front of me in revision.

The facts of the case as found by the trial court, and I may add amply supported by the evidence, are briefly as follows. The complainant and the accused are cousins and neighbours. Apparently as a result of excessive drinking, the accused assaulted and beat his wife and his mother, who is the complainant’s aunt. When the complainant went to their rescue and intervened the accused turned on him and struck him with his fist a number of times. The complainant, realising that the position was hopeless, fled and hid. The accused followed him and again struck him. The complainant again fled. The accused pursued him, picking up a piece of wood on the way, and with which he attempted to strike him. However, the complainant succeeded in evading him and went inside a house (it is not clear where – nor particularly material) wherein the accused followed him and again struck him. When the accused’s father intervened,

the accused turned on him, this giving the complainant an opportunity to escape, which he did, and he hid in the cattle boma. The accused however followed him there, this time armed with a knife. Not surprisingly the complainant again fled, and whilst running away from the accused, in attempting to jump a furrow he fell, landing on some stones and breaking his leg. Whilst he lay

there helpless the accused came up, looked at him, said he “was finished” and went off, leaving the complainant lying there semi-conscious. The complainant was eventually found and taken to hospital, where he spent five months, and his leg was amputated.

In his judgment the learned magistrate directed himself, *inter alia*:

“Although the accused did not hit in order to break the leg of the complainant, he technically did so by setting the motion of the whole system which resulted a grave injury on the complainant’s leg. The complainant was at a big dilemma. If he stood within the reach of the accused he would no doubt been knifed. As he decided to run in escape, which is a natural thing, he fell into the ditch thereby losing his leg. Indeed, the accused attempted to do an act which would end if not interfered with in a felony. The accused was holding a knife when chasing the complainant. It can correctly be inferred that he intended to stab the complainant, taking into consideration the beatings inflicted to the complainant before the accused was armed with a knife. From this fact, I considered that the harm sustained by the complainant was the final goal of the accused, for he retired immediately he saw the complainant broke his leg.”

The learned magistrate accordingly convicted the appellant as charged.

In submitting the proceedings to the Director of Public Prosecutions, my learned brother minuted:

“It does not appear the conviction could stand. The complainant broke his leg when he fell down in a ditch while he was being chased by the accused. He was not physically assaulted by the accused.

This may well be a civil case but I am doubtful if a criminal charge can be supported.”

In intimating that he wished to be heard, the Director of Public Prosecutions stated:

“In my opinion, the causing of the serious injury was the culmination of a series of assaults on the complainant by the accused. The fall was occasioned when the complainant was literally pursued by the accused, who was armed with a lethal weapon. Could we not regard the crucial incident as a continuing transaction and not in a sort of isolation. Perhaps *Thabo Meli v. R.* ([1954] 1 W.L.R. 228) may be useful in appraising this by no means easy case.”

When the case came before me in revision, counsel for the Republic intimated that he did not support the conviction, submitting that “there was no evidence before the magistrate that the harm sustained by the complainant was caused by the prisoner”. Learned counsel did not, however, cite any authority.

With respect, I fully agree with the learned Director of Public Prosecutions that this is by no means an easy case. The facts of the case cited by the learned Director in his minute, as set out in the headnote, were:

“The appellants, in execution of a preconceived plot to kill the deceased, took him to a hut where he was struck over the head with an instrument, and then, believing him to be dead, they took him out and rolled him over a low cliff and dressed the scene to make it look like an accident. The medical evidence established, however, that the injuries received in the hut were not sufficient to cause the death, which was in fact due to exposure when he was left at the foot of the cliff. The appellants appealed against their conviction for murder, alleging, *inter alia*, that while the first act – the blows in the hut – was accompanied by mens rea, it was not the cause of

death, but that the second act, while it was the cause of death, was not accompanied by mens rea, and contended that in those circumstances they were not guilty of any crime, except perhaps culpable homicide.”

It was there:

“*Held*: that it was impossible to divide up what was really one transaction in that way. The appellants set out to do all those acts as part of, and to achieve their plan, and it was much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before it in fact was, therefore they were not guilty of murder. There was no difference relevant to the present case between the law of South Africa and that of England, and by both laws there could be no separation such as that for which the appellants contended merely because of their misapprehension.”

It is also not irrelevant to quote from the judgment ([1954] 1 W.L.R. at p. 230):

“It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgment to say that because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. Their Lordships do not think that this is a matter which is susceptible of elaboration.”

That case can, I think, be distinguished from this instant case, in that although there were two separate acts by the appellants, the latter causing the death, the fact remains it was the appellants’ act which actually caused the death, whereas in our case the injury was caused by the complainant’s attempting to jump over the furrow in fleeing from the accused. Even in the absence of any authority I would be inclined to agree with the learned magistrate and uphold the conviction, possibly if only by analogy with the definition of murder in the Penal Code at s. 203, the relevant part which reads:

“A person is deemed to have caused the death of another person although his act is not the immediate or sole cause of death in any of the following cases:

...

- (c) if by actual or threatened violence he causes that other person to perform an act which causes the death of that person, such act being a means of avoiding such violence which in the circumstances would appear natural to the person whose death is so caused.”

Analogies, however close, and reasoning, however strong, cannot by themselves create or even extend a criminal offence. There is however express authority to the point. In *R. v. Halliday* ((1889), 61 L.T. 701) it was held, reciting the headnote:

“Where one person creates in the mind of another person such an immediate sense of danger as causes such other person to endeavour to escape, the person who created such a state of mind is responsible for any injuries which may result from his acts to the person endeavouring to escape.

In order to escape from the violence of her husband, who had used threats to his wife amounting to threats against her life, the wife got out of a window, and in so doing fell to the ground and broke her leg. The

husband was convicted upon an indictment which charged him, under 24 & 25 Vict, c. 100, s. 20, with having wilfully and maliciously inflicted grievous bodily harm on his wife.

Held that he was rightly convicted.”

To my mind, that case is on all fours with this instant case before the Court. In the circumstances, with all due respect to learned counsel, I have not the slightest hesitation in upholding the conviction.

In sentencing the accused, the learned magistrate directed himself:

“Although the accused is the first offender, I consider that he deserves a very heavy sentence. The complainant has now lost one leg. The accused does not seem to repent or sympathise for the injury caused on his cousin. The dispute or quarrel was not between the accused and the complainant to justify such terrible and permanent injury. I consider that a cattle thief could stand a better chance of leniency than the bloodthirsty offender as this accused person. I am therefore sentencing him to undergo a prison sentence for a term of three years. Accused to pay compensation to the complainant for Shs. 1,500/- by levy.”

With respect, I fully agree with the learned magistrate that the sentence imposed is well deserved, particularly bearing in mind the lethal weapon – a knife – the accused was armed with and would doubtless have used. The sentence is accordingly hereby confirmed.

Appeal dismissed.

The accused did not appear and was not represented.

For the Republic:

EO Effiwatt (State Attorney, Tanzania)

Attorney-General, Tanzania.

Ngura v Republic [1968] 1 EA 206 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	8 December 1967
Case Number:	846/1967 (49/68)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Co-accused – Right of one co-accused to cross-examine another – Whether failure to afford opportunity for is failure of justice.*

[2] *Criminal law – Trial – Co-accused – Right of one co-accused to be given opportunity to cross-examine another co-accused – Whether omission to give such opportunity is always a fundamental irregularity.*

Editor's Summary

The appellant and another accused were charged (*inter alia*) with larceny and were tried together. The other accused gave evidence on oath, but there was no indication in the record that the appellant cross-examined him, or was informed of his right to do so but had no questions to ask. The other evidence against both accused was very strong. The appellant was convicted and appealed. On appeal the High Court considered whether there had been a failure of justice as a result of the appellant not having been allowed to cross-examine his co-accused.

Held –

- (i) it is not reasonable to lay down as a rigid proposition that in every case in which there is an omission to afford an accused person the right to cross-examine his co-accused there is ipso facto a fundamental irregularity necessitating the quashing of the conviction (*Edward s/o Msenga v. R.* (1) discussed);

- (ii) in this case there was on record enough evidence apart from that of the co-accused to justify the conviction of the appellant and no failure of justice could be said to have been occasioned.

Appeal dismissed.

Case referred to:

- (1) *Edward s/o Msenga v. R.* (1956), 23 E.A.C.A. 553.

Judgment

Georges CJ: In this case, Simon Peter and Tuhani Ngura were charged with three offences: bicycle theft, contrary to s. 265 of the Penal Code; escape from lawful custody, contrary to s. 116; and malicious damage, contrary to s. 326 (1). The particulars to these charges alleged that the accused persons stole a gent's bicycle which was the property of Tuarira Naaman at the Kilombero sugar factory on June 30, 1967; that they escaped on July 2, 1967, from the lawful custody of a messenger, Gerald Mbunda; and that they jointly damaged a pair of handcuffs, the property of the Tanzania government.

The first accused, Simon Peter, pleaded guilty to the second and third counts, that is, escaping from lawful custody and malicious damage to the handcuffs. He pleaded not guilty to the first count of stealing the bicycle. The appellant pleaded not guilty on all counts. Simon Peter was convicted on the count of stealing and the appellant on all three counts. Simon Peter was sentenced in all to a term of imprisonment of six months and has not appealed. The appellant was sentenced to ten months' imprisonment on the stealing count, four months on the escaping count and two months on the malicious damage count, all sentences to run concurrently.

The case against the appellant was a strong one. Ali Athmani stated that both accused persons came to him with a bicycle which they offered him at Shs. 50/- He expressed interest if they could produce a receipt. As they could not produce one, he became suspicious and sent a boy to call a messenger. The messenger, Gerald Mbunda, arrived and he also insisted that they should issue a receipt and go to the district council office to complete the transaction. When they refused to do this, the messenger arrested them and took them to the local lock-up. The messenger confirmed this story.

After the arrest, which took place on July 2, Tuarira Naaman on July 5, 1967, identified the bicycle as his by the serial number on the frame.

There was also evidence that the accused persons, who had been handcuffed in the lock-up, broke the handcuffs and escaped from the lock-up by making a hole in the wall. They were later re-arrested. The appellant was re-arrested on July 10. By then the police had the broken pair of handcuffs which had been handed to them by Simon Peter on July 4 when he was re-arrested.

On this evidence, a very strong *prima facie* case had been made out and the accused were called upon to make their defence. Simon Peter elected to give evidence on oath. He stated that his co-accused had come to his house with a bicycle, which he said he did not know how to ride and had asked him to give him a lift on it to Kiberege village to the home of Ali Athmani. The purpose of the visit was stated to be the collection of a debt. He said that when they got there they drank some tembo. He got drunk and fell asleep outside. He was awakened at about 11 p.m. by two people who wanted to know what he was doing there. Next morning the appellant told him that he wanted to sell the bicycle but the buyer was interested

in getting the wheels only. Half an hour later, a messenger arrived and took them to the lock-up at Kiberege. Both of them were handcuffed. The appellant cut the handcuffs, made a hole in the wall

and escaped, and he, Simon Peter, also escaped. He was rearrested on the 4th and handed the police the handcuffs which the appellant had left with him.

The record indicates that he was cross-examined by the prosecutor, but there is nothing to indicate that the appellant cross-examined him or was informed of his right to do so but had no questions to ask.

Simon Peter called two other witnesses, one of whom, Yahya Selemani, confirmed that the appellant had come to Simon Peter's house with a bicycle and had asked Simon Peter to give him a lift on the cycle to Kiberege village. Again the record shows that this witness was cross-examined by the prosecutor, but there is no indication that the appellant cross-examined that witness or was informed of his right so to do but had no questions to ask.

On the facts, the convictions are proper. It has been pointed out, however, that since the appellant was not afforded an opportunity to cross-examine his co-accused who had given evidence implicating him, there had been a fundamental irregularity in the proceedings. The case of *Edward s/o Msenga v. R.* ((1956), 23 E.A.C.A. 553) has been quoted in support of this proposition. In that case, the trial magistrate had made a positive decision not to allow the appellant to cross-examine his co-accused. There is nothing here which would support the view that any such positive decision was reached, although it is apparent from the record that the opportunity to cross-examine was not afforded. I would not myself think that this could be considered a distinction as far as the two cases are concerned. The court quoted with approval a passage from Archbold's Criminal Pleading, Evidence and Practice (33rd Edn.), p. 523. This passage is to be found in the 35th Edn. at para. 1388, and states:

"Where two prisoners are jointly indicted and evidence is called on behalf of one prisoner which tends to criminate the other, the latter is entitled to cross-examine the witness . . . The reason for the rule is that such evidence, though given in defence of one prisoner, becomes in fact evidence for the prosecution against the other."

The Court went on to say:

"We think that the failure to give the appellant the opportunity to cross-examine the co-accused was a denial of a fundamental right which was vital to a conviction on the first count."

It is not clear from the judgment whether the Court there was stating a general rule that failure to permit an accused to cross-examine his co-accused who has given evidence would in all cases be a breach of a fundamental right. Earlier on in the same judgment, the following statement occurs:

"We find it impossible to say that the refusal by the learned trial magistrate to allow the appellant to cross-examine the second accused did not *prejudice the appellant in his defence and did not result in a miscarriage of justice*. The evidence given by the second accused undoubtedly tended to incriminate the appellant . . . It was, therefore, clearly in the interests of justice that the appellant should have been given an opportunity of testing by cross-examination the truth of the evidence given against him by the second accused."

In that case the prosecutor, did cross-examine the co-accused and did ask questions on most of the points on which the appellant stated that he wished to cross-examine. Nonetheless, the Court of Appeal felt that it could not agree with the conclusion of the learned appellate judge that:

" . . . had the appellant been allowed to cross-examine, there is no reason whatsoever to believe that the second accused would have answered

differently.’ It cannot be assumed that the second accused would have answered differently if he had been cross-examined by the appellant. The appellant might well have material which was unknown to the prosecutor and which would have enabled him to cross-examine more effectively than the prosecutor.”

I am of the view, therefore, that the fundamental question for decision was whether or not there had been a failure of justice as a result of the appellant not having been allowed to cross-examine his co-accused. I do not think it reasonable to lay down as a rigid proposition that in every case in which there is an omission to afford an accused person that right, there is ipso facto a fundamental irregularity necessitating the quashing of the conviction.

It is true in this case, as has been pointed out by counsel for the respondent, that the learned magistrate states specifically in his judgment:

“From the evidence adduced before me and as the circumstances stand, I am really left with no doubt about second accused, but I believe the first accused did not steal the bicycle in question, but the second accused stole the bicycle. I also note the evidence which the second accused gave in his unsworn statement. For such, I am satisfied beyond all reasonable doubt as that second accused should be found guilty for all the three counts.”

It would appear from this that the evidence given by Simon Peter did affect the magistrate in coming to the conclusion to which he did. On the other hand, quite apart from this evidence, the case made out by the prosecution, which the magistrate accepted, established quite positively that both accused persons did turn up at Athmani’s house and that the offer for sale was made by both of them. Throughout the evidence of Ali Athmani and Gerald Mbunda, it is made quite clear that both persons offered the bicycle for sale. It is also established beyond doubt that the bicycle was the stolen bicycle and it had been stolen only the day before it was being offered for sale by these two persons. On that evidence, the accused persons could be called upon to explain their possession of property recently stolen. The appellant in fact gave no explanation. He said he knew nothing about the bicycle and he knew nothing about the handcuffs. He had been arrested in his field, apparently while harvesting paddy, had been taken to the police station and had been told that he would hear at the court of Manyoni what offence he had committed. He said that he did not know his fellow accused.

Quite apart, therefore, from anything said by Simon Peter in his statement, I am satisfied that there is on the record enough evidence to justify the conviction of larceny in this case. Any tribunal reasonably directing itself on the law and the facts could come to no other conclusion but that the appellant was guilty as charged. I am satisfied, therefore, that the omission of the magistrate to inform him that he could cross-examine Simon Peter did not materially affect the result in this case and cannot be said to have occasioned any failure of justice.

Accordingly, the appeal is dismissed and the convictions and sentences confirmed.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

EO Effiwatt (State Attorney, Tanzania)

Attorney-General, Tanzania

Odongkara and others v Kamanda and another
[1968] 1 EA 210 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 3 April 1968
Case Number: 138/1967 (50/68)
Before: Sheridan J
Sourced by: LawAfrica

[1] *Constitutional law – Busoga Government – Busoga District Administration – Effect of Uganda Constitution, s. 118; Constitution (First Amendment) Act 1966, First Schedule; Administrations (Kingdoms) Act 1966; Local Administrations Act, ss. 1 (1), 3 (a) and 4 (U.).*

[2] *Practice – Amendment of pleading – Plaintiff – By substituting party – Application for should be by chamber summons – Civil Procedure Rules, O. 6, r. 30 (U.).*

[3] *Practice – Notice of Motion – Whether must state grounds on which made – Whether must be supported by affidavit where no evidence required – Matter of law only – Whether must be in prescribed form – Civil Procedure Rules, O. 1, r. 10 (2); O. 43, r. 3 (U.).*

Editor's Summary

By a plaint dated May 13, 1967 the plaintiffs sued a Muluka chief and also the Busoga Government for damages for false imprisonment. By a notice of motion unsupported by affidavit dated February 6, 1968 the plaintiffs applied to amend the plaint by substituting the Busoga District Administration “pursuant to the provisions of the Constitution of the Republic of Uganda, 1967”.

Held –

- (i) no affidavit in support was necessary as there was no question of evidence;
- (ii) the notice of motion was deficient because:
 - (a) it did not sufficiently set out the grounds on which it was made;
 - (b) it should not merely have sought to amend the plaint but should have specified that the application was made under O. 1, r. 10 (2) to strike out and substitute a party.

Observations on whether an originating notice of motion must be in prescribed form.

Application dismissed with costs.

Case referred to:

- (1) *Masaba v. Republic*, [1967] E.A. 488.

Judgment

Sheridan J: By a notice of motion dated February 6, 1968 the applicants/plaintiffs applied to amend their plaint as follows:

“That the name of the second defendant [‘Busoga Government’] be struck out and that the name of ‘Busoga District Administration’ be substituted thereto pursuant to the provisions of the Constitution of the Republic of Uganda, 1967.”

By a plaint dated May 13, 1967 the plaintiffs sued the first defendant, a Muluka chief and the servant of the second defendants, the Busoga Government, for damages for false imprisonment. The summons to enter an appearance in respect of the second defendants was served on the acting administrative secretary of the Busoga District Administration under s. 100 of the Local Administrations Act (Cap. 25) (since repealed). By their written statement of defence dated June 26,

1967 the second defendants took a preliminary objection that the “Busoga Government” at the time that the suit was brought did not exist in law, and the plaintiffs had not sued the Busoga District Administration, and that the service of the summons on the Administration was bad in law.

On September 8, 1967 the present Constitution came into force.

Counsel for the respondents/defendants, submits that the notice of motion is defective in that (1) it does not state the grounds on which it is made, (2) it is not supported by affidavit as is required by O. 43, r. 3, and (3) it is not in the proper form.

Counsel for the applicants submits that (1) the application in fact refers to s. 118 of the Constitution and sufficiently sets out the law, and (2) no affidavit is necessary as no question of evidence arises.

Order 43, r. 3. provides:

“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.”

I agree with the submission that no affidavit was necessary in this case as there is no question of evidence, this being purely a matter of law; but can it be said that the notice of motion “states in general terms the grounds of the application”?

Article 118 of the Constitution, as far as is relevant to this application, provides:

- “(1) The institution of King or Ruler of a Kingdom or Constitutional Head of a District, by whatever name called, existing immediately before the commencement of this Constitution under the law then in force, is hereby abolished.
- (4) Notwithstanding any provision of this Constitution, Parliament may make provision for the devolution of any property held by any person to whom cl. (1) of this article applies by virtue of his office or by any other person or authority, being property connected with or attaching to the institution of King, Ruler or Constitutional Head.”

It will be seen that while this article abolished the institution of the Constitutional Head of the Busoga District, the Kyabazinga, it did not say what was to happen to his property. That was left to Parliament (art. 18 (4)). But I read this article as referring to the personal property of the Kyabazinga, and not to the property of the Busoga Government or District.

Counsel for the defendants’ contention that the Busoga Government did not exist in law at the time the suit was brought seems to be correct. By the Administration (Western Kingdoms and Busoga) Act 1963 (Cap. 24) the government in respect of the territory of Busoga was the Busoga Government (s. 2) and was made a corporate body which could sue and be sued in its corporate name (s. 3). The Constitution (First Amendment) Act (Act 9 of 1966), Sched. 1, amended art. 2 (3) of the 1966 Constitution of Uganda, so that the Territory of Busoga became the District of Busoga. The Administrations (Kingdoms) Act (Act 12 of 1966) amended the Administration (Western Kingdoms and Busoga) Act 1963 accordingly, so that the Busoga Government was no longer a corporate body. Under the Local Administrations Act (Cap. 25), s. 3 (a) the Busoga District Administration was established, consisting of the Constitutional Head, the Secretary General and the Council, and it was incorporated with a right to sue and be sued. The Local Administrations Act (No. 18 of 1967), s. 1 (1), altered the

composition of a district administration so that it was to consist of a Secretary-General, and Assistant Secretary-General, a Chief Executive Council and a Council.

Schedule 4 to the Act provided:

- “1. All property, assets, funds, rights, liabilities and obligations which belonged to or were binding upon a former administration immediately before the commencement of this Act shall by virtue of this Act and without further assurance vest in and become binding upon the succeeding administration.”

In my view if this provision was going to be relied on the notice of motion should have stated at least that the Busoga Government had ceased to exist – its demise had been earlier as I have pointed out – and that all its property, assets, funds, rights, liabilities and obligations had been vested in the Busoga District Administration.

The notice of motion is further deficient in that it merely seeks to amend the plaint, which should have been by chamber summons under O. 6, r. 30. It should have specified that the application was made under O. 1, r. 10 (2) to strike out and substitute a party. In fact if the plaintiffs had correctly sued the Busoga District Administration in the first place there would have been no need to amend or substitute a party, although by operation of law its composition had been altered. It was still the Busoga District Administration.

In support of his submission that the notice of motion was in the wrong form, counsel for the defendants relies on *Masaba v. Republic* ([1967] E.A. 488) where Sir Udo Udoma, C.J., at p. 496, stated that an originating notice of motion must always be in a prescribed form and that as no form had been prescribed by rules of court, recourse should be made to the form set out in Atkin’s Court Forms (2nd Edn.), p. 180. With respect I can find nothing in O. 43 which calls for a prescribed form for a notice of motion, and the local practice has not been to institute such motions:

“In the Matter of Act

and

In the Matter of

Take Notice, etc. ”

However, it is not necessary for me to express a firm opinion on this point, and before doing so I should require to hear further argument.

Counsel for the defendants succeeds on his first submission.

The application is dismissed with costs.

Application dismissed.

For the plaintiffs:

C Mboijana

Mboijana & Co, Kampala

For the defendants:

JH Bhatt

JH Bhatt, Jinja

Sekaddu v Ssebadduka
[1968] 1 EA 213 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 9 April 1968
Case Number: 30/1964 (51/68)
Before: Sheridan J
Sourced by: LawAfrica

[1] Appeal – From Principal Court, Buganda – Claim by one party to suit and only appellant for less than Shs. 2,000/- for false imprisonment – Appeal filed in November, 1965 – Whether appeal should go to Judicial Adviser or to High Court – Buganda Courts Act, s. 26 (1) (b) and (3) – Magisterial Area (Buganda) Instrument 1966 – Magistrates’ Courts Act 1964 (as amended), s. 38 (8) – Civil Procedure Rules, O. 39, r. 3 (U.).

[2] False imprisonment – Defendant causing police to arrest plaintiff – Whether defendant responsible for actions of police.

Editor’s Summary

The respondent in 1952 caused the Mengo police to arrest the appellant on suspicion of stealing his property and the police thereupon detained the appellant. The appellant, after being released, sued the respondent in the Principal Court, Buganda, for damages for false imprisonment. The respondent in defence claimed that he was not responsible for the actions of the police, but made no attempt to justify the arrest. The Principal Court dismissed the claim, and the appellant then brought this appeal to the High Court, in November, 1965. In the High Court it was argued that the appeal should have gone to the Judicial Adviser, because the damages claimed by the appellant himself (but excluding the general damages claimed by his wife, who was also a party below) were less than Shs. 2,000/-; and a question also arose about the effect of the application to Buganda of the Magistrates’ Courts Act.

Held –

- (i) the value of the subject matter of the suit for the purpose of the appeal exceeded Shs. 2,000/-;
- (ii) the High Court had jurisdiction to hear the appeal;
- (iii) if a person sets the law in motion and causes another to be detained by the police it is no defence that the police thereby become responsible for the continued detention;
- (iv) once the detention or imprisonment is established the onus shifts to the defendant to show that it was reasonably justifiable.

Appeal allowed. Judgment entered for the appellant with costs here and below.

Cases referred to in judgment:

(1) *Ooko Otanga v. Philister Mary Nabunjo*, Uganda H.C.C.C. No. 613 of 1963; Uganda Monthly Bulletin No. 73 for March and April, 1965, No. 29/65 (unreported).

(2) *Clubb v. Wimpey & Co. Ltd.*, [1936] 1 All E.R. 69.

(3) *Walters v. W. H. Smith and Sons*, [1914] 1 K.B. 595.

Judgment

Sheridan J: In 1961 the appellant and his wife, who has not appealed, sued the respondent in the Principal Court, Buganda for Shs. 2,190/- damages for false imprisonment. The plaint alleged that on May 12, 1952 the respondent caused the Mengo police to arrest them on suspicion that they had stolen his property. Although the plaint alleged that they were detained for fourteen days they were in fact detained for three days when they were released

on bail. They probably had to report back to the police, which would be relevant to the claim for loss of profits. Particulars of this were given in the plaint which was adopted and signed at the hearing in accordance with the usual practice, and so became part of the evidence. The special damages totalled Shs. 1,190/-, in addition to which the plaintiffs each claimed Shs. 500/- as general damages.

The defence was that the respondent was not responsible for the actions of the police. This found favour with the Court, which dismissed the claim.

The main witness for the plaintiffs was Joswa Sebirumbi, a Mengo policeman, who testified to the respondent's complaint, the search of the plaintiff's house which revealed nothing, their imprisonment and release on bail. There was no evidence as to why the respondent suspected the plaintiffs of stealing his property.

In dismissing the claim the Court said:

"Relying on the evidence of the plaintiffs' witness No. 3 [Sebirumbi] where he said that in the usual procedure, a person searched and found with no stolen goods, is not released but kept in custody and continue to investigate the matter etc., the Court is satisfied that the responsibility for keeping the plaintiffs in the prison is not with the defendant but it is the procedure of the police to keep in custody a person suspected to have stolen his friend's goods (See C.P.C., s. 29 (1), Cap. 24, Laws of Uganda) and are kept in custody while continuing the investigation, and if they can't be discovered, then he is released. They did the same thing to the plaintiffs. For the foresaid reasons, the plaintiffs' case is dismissed with costs."

Section 29.(1) of the Criminal Procedure Code, which deals with the disposal of a person arrested by a private person without a warrant, is no authority for the police to detain a person in custody while investigations are being carried out.

Before considering the merits of the appeal it is necessary to dispose of a preliminary objection by counsel for the respondent, that the Court has no power to entertain it.

He submits that as the appellant's claim was for Shs. 1,690/- then, under s. 26 (1) (b) and (3) of the Buganda Courts Act (Cap. 39), which was still in force when the appeal was filed in November, 1965, the appeal should have been to the Judicial Adviser as the amount or value of the subject matter of the case did not exceed Shs. 2,000/-.

Counsel for the appellant invokes the analogy of the Civil Procedure Rules, O. 39, r. 3, which provides:

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the High Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

I think he is right. The value of the subject matter of the case did exceed Shs. 2,000/-.

The next question is what is to happen to this appeal which was brought under the Buganda Courts Ordinance, which ceased to have effect under s. 38 (2) of the Magistrates' Courts Act when the provisions of that Act were applied to Buganda on July 1, 1966 by the Magisterial Area (Buganda) Instrument 1966 (S.I. 1966 No. 101)?

Section 38 (8) of the Magistrates' Courts Act 1964, as amended by the Magistrates' Courts (Amendment) Act (No. 20 of 1966) provides:

- “(8) Subject to sub-ss. (6) and (7) of this section [which do not apply to the present appeal], revision and appeals in respect of proceedings in a Buganda Court immediately before the application of the Magistrates’ Courts Act 1964, shall be determined in accordance with the Buganda Courts Ordinance.”

In my view I have jurisdiction to hear this appeal. Counsel for the respondent, relying on *Ooko Otanga v. Philister Mary Nabunjo* (H.C.C.C. No. 613 of 1963), submits that this claim should have been heard in the High Court in the first instance. That was a suit for malicious prosecution in which, so counsel for the appellant informs me, he appeared for the plaintiff and pleaded the English common law under s. 9 (c) of the Buganda Courts Act to confer jurisdiction on the High Court. There was no application for a transfer to the Principal Court. The suit was heard *ex parte* by Fuad, J. who gave judgment for the plaintiff. In fact the judgment and decree were set aside under O. 9, r. 24, by Russell, J. (Monthly Bulletin No. 73 for March and April 1965, No. 29/65). Whether or not that decision is any authority for excluding claims for malicious prosecution from the jurisdiction of the Principal Court, it is well established that it did recognize claims for damages for false imprisonment; Haydon’s Law and Justice in Buganda, p. 264. Up to the time of its abolition the Court was assimilating the notions and principles of the English common law. It is clear from Atkin’s Encyclopaedia of Forms and Precedents, Vol. 3, pp. 13 – 16, that if a person sets the law in motion and causes another to be detained by the police, it is no defence that the police thereby become responsible for the continued detention.

In *Clubb v. Wimpey & Co. Ltd.* ([1936] 1 All E.R. 69) S, an agent of the defendants, thinking the plaintiff guilty of larceny, gave him into custody and signed the charge sheet. S stated in evidence “I did give him in charge”.

It was held that this amounted to false imprisonment. Per Charles, J. (ibid. at p. 70):

“It is a well known principle of law that you can have imprisonment by police and informant, that the person who has given a man in charge cannot release himself from the obligations placed on him (*Walters v. W. H. Smith and Sons* [1914] 1 K.B. 595).”

Once the detention or imprisonment is established the onus shifts to the defendant to show that it was reasonably justifiable. No such attempt was made in the instant case. I find that the Principal Court seriously misdirected itself on the law.

Although the appellant did not keep books of account in connexion with his shop and restaurant, I think that the damages were sufficiently proved.

I allow the appeal and enter judgment for the appellant for Shs. 1,690/-with costs here and in the Court below.

Order accordingly.

For the appellant:

SV Pandit

SV Pandit, Kampala

For the respondent:

PV Phadke

Parekhji & Co, Kampala

Wanjiku v Macaria
[1968] 1 EA 216 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 25 March 1968
Case Number: 12/1967 (52/68)
Before: Farrell J
Sourced by: LawAfrica

[1] Evidence – Marriage – Presumption of validity – Evidence of ceremony followed by cohabitation – What evidence to the contrary required to rebut presumption.

Editor's Summary

The appellant applied for maintenance from the respondent under the Subordinate Courts (Separation and Maintenance) Act. She produced a marriage certificate referring to a ceremony of marriage in 1963, and it was not disputed that the parties had cohabited after that ceremony. It was proved, however, that the appellant had, in evidence in another case, testified that she was married to another man in 1952 or 1953. The magistrate dismissed her application, holding that she had not proved that the respondent was her husband. On appeal to the High Court:

Held –

- (i) all that is required to rebut the presumption of validity of a marriage arising from proof of a ceremony followed by cohabitation is some evidence which leads the court to doubt the validity of the marriage in question. “Decisive evidence to the contrary” is not necessary (*Spivack v. Spivack* (1) and *Tweney v. Tweney* (2) applied);
- (ii) there was no ground for disturbing the magistrate’s assessment of the evidence.

Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Spivack v. Spivack* (1930), 142 L.T. 492.
- (2) *Tweney v. Tweney*, [1946] 1 All E R. 564.
- (3) *Re Peete, Peete v. Crompton*, [1952] 2 All E.R. 599.

Judgment

Farrell J: This is an appeal from a decision of the resident magistrate, Nairobi, on an application by the complainant for (*inter alia*) maintenance under s. 3 of the Subordinate Courts (Separation and Maintenance) Act (Cap. 153 of the Revised Laws 1962). The learned magistrate found that the

complainant had failed in the essential preliminary step of establishing that the defendant was her husband, and dismissed her complaint.

The complainant and the defendant went through a ceremony of marriage at St. Alban's Church, Dar-es-Salaam, in November, 1963. The certificate of marriage was produced and shows that the complainant described herself as a spinster and she stated in evidence that she had never been married before. It is not disputed that after the ceremony of marriage the parties cohabited for substantial periods first in Dar-es-Salaam and later in Nairobi.

For the defendant it was established that in Civil Case No. 1049/61 heard in Nairobi the complainant as plaintiff had described herself as married to the defendant in those proceedings, one Hoseah Isige Zedekiah, and had so testified in her evidence, claiming to have been married to the defendant in 1952 or 1953 in the D.C.'s office at Nairobi.

In her evidence in the present case the complainant denied that she had given such evidence in the earlier case but the learned magistrate was in no doubt that

she had done so, and there is no ground for interfering with his finding of fact upon this point. In accordance with this finding the learned magistrate regarded her earlier evidence as an admission proved against her in accordance with s. 21 of the Evidence Act.

On the issue whether the complainant had established that she was lawfully married to the defendant the learned magistrate referred to certain passages in 19 Halsbury's Laws (3rd Edn.), pp. 812 – 813. There is no suggestion that these passages are not equally applicable to the law of this country as they are to the law of England, but with respect the learned magistrate has not been entirely accurate in his citation. Paragraph 1323 describes the presumption from cohabitation which arises where there is no positive evidence of a marriage having taken place, and states that the presumption can be rebutted only by strong and weighty evidence to the contrary. This paragraph has no relevance to the circumstances of this case where there is ample proof of the marriage having taken place. The paragraph which is relevant to these proceedings is para. 1324, which so far as material reads as follows:

“Presumption of validity. Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary . . .”

The learned magistrate did not refer to the concluding phrase of the passage cited, and although the distinction may be a fine one, he should, on the basis of the passages referred to, have considered not whether there was strong and weighty evidence to the contrary, but whether the evidence to the contrary was decisive.

In considering the question of the evidence to the contrary, the learned magistrate correctly observed in favour of the complainant that “no doubt the weightiest evidence that could be adduced would be the testimony of an eye witness to the 1952 ceremony, or production of a document of an official nature evidencing it” and pointed out that the failure to produce any evidence of the registration of the earlier marriage had not been explained. Nevertheless, he went on to consider the admission made by the complainant in the earlier suit and the circumstances in which it had been made, and found that “grave and weighty evidence had been adduced to impeach the validity of the subsequent marriage celebrated in Dar-es-Salaam”. Whether, if he had correctly applied the test laid down in Halsbury (*supra*), he would have found the evidence “decisive” cannot be deduced with certainty.

I do not, however, find it necessary to consider the question in these terms, as it appears to me in the light of subsequent decisions, that the law is not correctly stated in the passage from Halsbury to which I have referred. That statement of the law is founded on the authority of *Spivack v. Spivack* ((1930), 142 L.T. 492). That case was followed by *Tweney v. Tweney*, in which Pilcher, J., stated the law as follows ([1946] 1 All E.R. at p. 565):

“The way in which the matter should be regarded is in my view this. The petitioner's marriage to the respondent being unexceptionable in form and duly consummated remains a good marriage until some evidence is adduced that the marriage was in fact a nullity.”

In a later passage the learned judge said:

“This court ought to regard the petitioner, who comes before it and gives evidence of a validly contracted marriage, as a married woman until some evidence is given which leads the court to doubt the fact.”

In the subsequent case of *Re Peete, Peete v. Crompton* ([1952] 2 All E.R. 599), Roxburgh, J., reviewed the earlier authorities including *Spivack* and *Tweney* (*supra*), and in the light of a binding decision of the Court of Appeal given in 1926, accepted without hesitation the second passage cited from the judgment of Pilcher, J., in *Tweney* as a correct statement of the law.

If the decision of Roxburgh, J., is correct, and I accept it as such, the statement of the law in Halsbury cannot be relied on in so far as it requires “decisive evidence to the contrary”. All that is required is some evidence which leads the court to doubt the validity of the marriage in question. The learned magistrate found such evidence which he regarded as grave and weighty. There is no ground for disturbing his assessment of the evidence, and it goes far beyond what the law requires for the impeachment of the validity of the marriage.

For the above reasons the appeal is dismissed with costs, and the judgment of the learned magistrate is confirmed.

Appeal dismissed.

For the appellant:

JB Patel

HP Makhecha & Co, Nairobi

For the respondent:

BJ Sarvaiya

BJ Sarvaiya, Nairobi

Essaji and others v Solanki [1968] 1 EA 218 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	10 August 1967
Case Number:	40/1967 (29/68)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] *Appeal – Application for leave to appeal out of time – Error of advocate – Whether error fatal.*

[2] *Appeal – Dismissal – Extension of time to put the papers in order refused – Whether order of dismissal competent – Whether counsel’s mistake as to form of order bars extension of time.*

[3] *Rent Restriction – Application for stay of eviction order granted – Appeal by landlord dismissed – Papers not in order – Application for extension of time – Whether order for dismissal competent – Rent Restriction Act, s. 19 (5) (T.).*

[4] Practice – Adjournment – Application for time to put papers in order refused – Whether order for dismissal of appeal competent – Whether counsel’s mistake as to form of order bars an extension of time.

[5] Practice – Error of advocate – As to form of order attached to memorandum of appeal – Application for extension of time – Whether counsel’s mistake bars granting of application.

Editor’s Summary

The applicant was the landlord of premises and he obtained an eviction order against his tenant the respondent. As a result of an application under s. 19 (5) of the Rent Act, the respondent was granted a stay of execution of the eviction order against which the applicant appealed. The applicant’s memorandum of appeal had attached to it a document which did not amount to a formal order of the lower court’s ruling and the learned judge dismissed the appeal. He refused to allow the applicant an extension of time to enable the papers to be put

in order on the grounds that this would be tantamount to allowing the appellant to have a second chance. Against this ruling the applicant was allowed leave to appeal.

Held –

- (i) that part of the decision in *Bhogal's* case (1), relied upon in the court below, which purported to lay down that an appeal which has been dismissed for failure to comply with the prescribed conditions cannot be restored by an application for extension of time was no longer good law as far as the Court of Appeal for East Africa is concerned;
- (ii) there is nothing in the Civil Procedure Code to preclude the High Court from accepting guidance from dicta and judgments dealing with the practice and procedure of the Court of Appeal for East Africa;
- (iii) the application before the court was not one to extend time for filing an appeal which had already been filed as there was no competent appeal before the court;
- (iv) the applicant's counsel's error in failing to realise that the order he was filing was not the correct order was not necessarily a bar to his obtaining an extension of time.

Appeal allowed. Application granted with costs to the respondent.

Cases referred to in judgment:

- (1) *Harnam Singh Bhogal v. Jadvia Karsan* (1952), 20 E.A.C.A. 17.
- (2) *Ngoni-Matengo Co-operative Marketing Union Ltd. v. Alimohamed Osman*, [1959] E.A. 577.
- (3) *Shangara Singh and Others v. Imam Din and Others* (1940), A.I.R. Lahore 314.
- (4) *Chokalingam v. Seethai* (1927), 6 Rang. 29; [1927] P.C. 252.
- (5) *Commissioner of Transport v. Attorney-General of Uganda and Another*, [1959] E.A. 329.
- (6) *Farrab Incorporated v. The Official Receiver and Provisional Liquidator*, [1959] E.A. 5.
- (7) *N.A.S. Airport Services Ltd. v. Attorney-General of Kenya*, [1959] E.A. 53.
- (8) *Gatti v. Shoosmith*, [1939] 3 All E.R. 916.
- (9) *Shabir Din v. Ram Parkash Anand* (1955), 22 E.A.C.A. 48.

Judgment

Georges CJ: This application arises from proceedings with a somewhat eventful history. The applicant was the landlord in a suit for possession against the respondent, the tenant in the original action. He succeeded and obtained a decree. On May 9, 1967, execution was filed in respect of that decree. On May 10, 1967, the eviction order was issued. On May 12, 1967, the respondent applied to have the eviction order stayed under powers vested in the court by s. 19 (5) of the Rent Act. On May 13, 1967, the court bailiff executed the order and put the applicant in possession. On May 15, 1967, the application for suspension of the eviction order came up for hearing. On May 17, 1967, in the district court, the senior resident magistrate delivered a ruling in favour of the respondent. On May 18, 1967, the applicant bespoke a copy of the order. On the same day, he received a document headed with the title of the suit

and the word “Ruling”. There followed what may be called the senior resident magistrate’s reasons for judgment, duly signed. Beneath that was the word “Order”, followed by the words “The date of vacant possession to 30/11/1967. Cost of Shs. 100/- to the respondent”. That, too, is signed and dated by the senior resident magistrate. Applicant’s advocate attached this document to

his memorandum of appeal and duly filed it. When the appeal came up for hearing, there was a preliminary objection that the document attached to the memorandum of appeal was not a formal order of the court's ruling. Hamlyn, J., agreed with that objection. Counsel for the applicant then asked that the proceedings be adjourned so that they could be put in order. This request was not granted. Relying on *Harnam Singh Bhogal v. Jadva Karsan* ((1952), 20 E.A.C.A. 17), Hamlyn, J., held that this would be tantamount to allowing the appellant to have a second chance. Hamlyn, J., granted leave to appeal against his ruling.

Meanwhile, this application was filed. At the hearing yesterday, I was asked to deliver my ruling as a matter of urgency, as tomorrow is the last day for appealing from the order of Hamlyn, J.

To begin with, it is unfortunate that at the hearing before Hamlyn, J., no one drew his attention to the case of *Ngoni-Matengo Co-operative Marketing Union Ltd. v. Alimohamed Osman* ([1959] E.A. 577). In that case, the passage from *Bhogal's* case which suggested that allowing an application for extension of time to appeal in such circumstances would be tantamount to giving the appellant a second chance was stated to be obiter. The Court of Appeal specifically refused to follow it. The case itself has not been overruled, as the decision can be supported on other grounds. So much of it, however, as purports to lay down – as far as the Court of Appeal for East Africa is concerned – that an appeal which had been dismissed for failure to comply with the prescribed conditions cannot be restored by an application for an extension of time to file the appeal in accordance with the rules is no longer good law.

I would mention this matter merely to put the record straight and not in any way to sit in judgment on whatever Hamlyn, J., may have done in this matter. It has been urged that by entertaining this application at all, I would be doing just that. With respect, I think not. The application before Hamlyn, J., as his judgment makes clear, was an application for an adjournment to put the papers in order in case the court was against the appellant on the procedural point. There was no application for an extension of time – the application with which I am now concerned. Hamlyn, J., held that since the papers were not in order, there was nothing before him, and hence there was nothing to adjourn. In the context of this application, there is no need to discuss or differ from that proposition.

In his final order, Hamlyn, J., dismissed the appeal. A similar order had been made by the tribunal of first instance in the case of the *Ngoni-Matengo Co-operative Marketing Union Ltd. v. Alimohamed Osman* (*supra*). Windham, J.A., as he then was, delivering what was in effect a judgment of the Court, discussed this matter as follows:

“In the present case, therefore, as in *Bhogal's* case, when the appeal came before this court, it was incompetent for lack of the necessary decree, as in *Bhogal's* case for lack of the necessary order. This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive, and not a properly constituted appeal at all. What the court ought strictly to have done in such case was to ‘strike out’ the appeal as being incompetent, rather than to have ‘dismissed’ it; for the latter phrase implies that a competent appeal has been disposed of, while the former implies that there was no proper appeal capable of being disposed of. But it is the substance of the matter that must be looked at, rather than the words used; and since neither the appeal in *Bhogal's* case, nor the present appeal was in fact capable of being dismissed, that is to say, of being treated as being properly before the court, each must be treated as if it had been struck out, which, in effect, it was. It seems to me that the reasoning in the passage from the

judgment on the application in *Bhogal's* case which I have set out is based upon the inadvertent assumption that what the court had previously dismissed was a competent appeal, so that a subsequent attempt to restore it would, or might, be met by a plea of res judicata. But since both there and in the present case, the earlier appeal was incompetent, there was no res before the court capable of becoming judicata.”

With the entirety of this passage, I respectfully agree. It appears to me to be good sense and good law.

It has been urged that I should not be bound by decisions of the Court of Appeal for East Africa on matters of procedure, as that court is not bound by the Civil Procedure Code which governs the Courts of the individual states. I was referred to O. 39, r. 16 (1) and (2), and it was pointed out that power has been granted to the Court to reinstate only appeals dismissed under r. 11 (2), r. 17 and r. 18, which deal with dismissal of appeals for default of appearance of the appellant, or non-appearance of the respondent because of appellant's failure to defray the cost of serving notice upon the respondent.

I do not think this argument is relevant in the circumstances of this case. In my view, any court has an inherent power to strike out proceedings which are incompetent. To provide for the re-admission of competent appeals dismissed for default of one sort or another cannot negative the right to strike out proceedings which are incompetent because of failure to comply with the appropriate rules. The principle of *inclusio unius exclusio alterius* does not seem to me applicable.

I would hold there is nothing in our Civil Procedure Code which so prescribes the power of this court sitting as a Court of Appeal as to preclude acceptance of guidance in a matter such as that under consideration from dicta and judgments dealing with the practice and procedure of the Court of Appeal for East Africa.

Accordingly, I accept that the position in Tanganyika is as laid down by the Court of Appeal in the case of *Ngoni-Matengo Co-operative Marketing Union Ltd. v. Alimohamed Osman*, ([1959] E.A. 577). The appeal should have been struck out, not dismissed. I would also hold that looking at the substance, as one should properly do, unless completely precluded by clear statutory provisions, I should treat the order for dismissal as though it were an order to strike the appeal out as incompetent.

It was also urged that s. 5 of the Limitation Act, which confers the power to enlarge time to file an appeal, deals only with appeals which have not been filed. It cannot apply to appeals which have been filed, unless such applications fit under the phrase “any other applications to which this section is made to apply”. It is argued that an application to extend the time for filing an appeal already filed is not an application to which s. 5 has been extended.

The brief answer to this argument, in my view, is that the application before me is not one to extend time for filing an appeal which has already been filed.

In the words of Windham, J.A., as he then was, the argument is based on “the inadvertent assumption” – which was the source of error in *Bhogal's* case – that the appeal before Hamlyn, J., was a competent appeal. It was not. This application cannot, therefore, be treated as an application in connection with an appeal which has already been filed.

I have read the case of *Shangara Singh and Others v. Imam Din and Others* ((1940), A.I.R. Lahore 314). That was a suit in which one Hira Singh was originally defendant. During the pendency of the suit, he died, and in his place four persons were brought on the record as his legal personal representatives. After decree, there was an appeal and only three of the four substituted legal

personal representatives were named as respondents. The appeal came on for hearing, and it was objected that it could not proceed because all the parties were not on the record. There was then an application to bring the fourth legal personal representative on the record, but the period of limitation had by then passed. It was held that s. 5 could not extend to that application because there was already an appeal before the court, and unless the section were made specially applicable to such cases, it could not be invoked.

In Chitale and Annaji Rao's Code of Civil Procedure (2nd Edn.), Vol. 3, p. 2670, there appears the following comment on O. 41, r. 20 of the Indian Civil Procedure Code, which was the section under which the application seems primarily to have been made:

"The power of the Court under this rule is not subject to the provisions of the Limitation Act, and a party who is interested in the result of the appeal may be added as a respondent under this rule, though the period of limitation for an appeal by or against him may have expired. The Privy Council decision in *Chokalingam v. Seethai* ([1927] P.C. 252) does not affect the correctness of this proposition, which is accepted law by all the High Courts. But the powers under this rule should be exercised very cautiously inasmuch as a person in whose favour the lower court has passed a decree against which an appeal is not filed within the period of limitation has a substantive right of a valuable kind which should not be lightly treated. Where a respondent is added, not under r. 20 but under O. 1, r. 10, read with s. 107, the provisions of the Limitation Act will apply."

It should be noted that in the case of *Shangara Singh (supra)*, the learned judge, in the course of his judgment, pointed out that the decision with regard to s. 5 of the Limitation Act might be open to doubt, but he considered himself bound by it. It would hold that the comments in that case are obiter and that, in any event, the appeal in that case was still subsisting. It was not an appeal which was bad for failing to comply with a statutory prerequisite as to form.

A number of cases were cited, and I was asked to consider whether the time elapsed between the bespeaking of an order and its receipt should be excluded from the period elapsed in computing the period within which an appeal may be filed. The contention arises because the applicant claims that he bespoke the order on May 18, 1967, and did not finally get it until July 31, 1967. If that period is excluded, his appeal would be in time. I do not think this argument has any relevance to this case. A document was handed to the applicant's advocate, which he treated as an order. Had he queried it and asked that he should be given the formal order of the court which he received on July 31, 1967, no doubt he would have got that document. All the cases cited are cases in which for one reason or another no formal order could be drawn up because of delays in the mechanics of their preparation by the court. This is not the case here. To treat the issue of the order on July 31, 1967, as related to the bespeaking on May 18, 1967, it to be unrealistic. If the court errs in the issue of a document which it has been asked to issue, the party receiving the document has an opportunity to ask that the error be corrected. The fact that there is a delay in making that request, to my mind, introduces another factor in the situation which makes the cases cited to me quite inapplicable.

One comes then to what is the fundamental issue for decision in this case, whether in the circumstances already set out at some length, there is sufficient cause to extend the time for appealing.

On the one side, it is argued that an error by counsel is not sufficient cause for extending time. This was discussed at some length in the case of *Commissioner of Transport v. Attorney-General of Uganda and Another* ([1959] E.A. 329).

This was yet another case where the decree appealed from had not been extracted and filed in time. The appellant's counsel filed an affidavit, one paragraph of which read:

"That due to an error of judgment on my part, the decree appealed against had not been extracted before the record of appeal was so filed, and consequently no copy of such decree was filed as part of the record of appeal."

At the hearing of the appeal, counsel stated:

"The defect had occurred as a result of his being unaware of the line of decisions of this court, which culminated in *Farrab Incorporated v. The Official Receiver and Provisional Liquidator* ([1959] E.A. 5) and *N.A.S. Airport Services Ltd. v. Attorney-General of Kenya* ([1959] E.A. 53)."

The application was unsuccessful. The court said:

"We regret the necessity for shutting out any appeal and would always hear an appeal if we could properly do so. We felt, however, that it would not be a proper exercise of the discretion to accept as 'sufficient reason' the grounds for non-compliance with the rule put forward in this case, and that if we were to do so, an extension would have to be granted in every case, and we should be setting a precedent which would nullify the provisions not only of r. 56 of this Court's Rules, but the relevant provisions of the Uganda Civil Procedure Code."

On the other hand, in the case of *Ngoni-Matengo Co-operative Marketing Union Ltd. v. Alimohamed Osman* ([1959] E.A. 577) the facts were as follows: counsel applied for the decree in the case to file an appeal. He was handed a decree which was in fact an order made on a preliminary ruling in the case. At the hearing objection was taken that the decree appealed from had not been filed in time. The court granted an extension of time. There the Court-said:

"The general principle laid down in that case [*Gatti v. Shoosmith* ([1939] 3 All E.R. 916)] that a mistake of counsel is not necessarily a bar to his obtaining an extension of time, has been followed by this court in a number of cases, among which may be mentioned *Shabir Din v. Ram Parkash Anand* ((1955), 22 E.A.C.A. 48). More recently, it is true this court has laid down that, in view of the clear terms of the relevant rules requiring the decree or order to be extracted before an appeal is lodged, in particular r. 56, an applicant who fails to take steps to comply with that requirement cannot excuse himself by pleading that his failure was due to any 'error of judgment' on his part, and such failure may not of itself be held to afford 'sufficient reason' for the purposes of r. 9."

After mentioning the *Farrab* case, the *Commissioner of Transport* case and the *N.A.S. Airport Services* case, all cited above, the court continued:

"But in each of those cases, the applicant's omission to extract the decree or order within the time for lodging his appeal had been due either to a failure to appreciate the legal necessity for so doing, or to a lack of diligence in taking steps to see that it was done in time. In the present case, the position was very different, since counsel for the applicant was fully aware of the requirement of the rules and of the relevant decisions of the court, and had taken all steps to comply with them up to the eve of the lodging of the appeal, and it was the mistake of the Registry of the High Court in their supplying him with a copy of the wrong decree, which was the primary cause of his non-compliance. For this reason, I agree with Law, J., that

the applicant showed 'sufficient reason' for an extension of time for the purpose of r. 9."

The facts of this case appear to be halfway between those of the two cases from which citations have been made above. Counsel was apparently aware that he should attach to the memorandum of appeal a copy of the order appealed from. He was diligent in applying for it. He was supplied with a certified copy of the reasons for judgment, with a paragraph attached. It is urged with force that this was so clearly not a formal decree that counsel should have immediately seen that was not what he required and he should have seen that the proper document was issued. There was much time to have this done. Counsel for the appellant stated in argument he thought he had received a certified copy of the order, and that no particular form was required. As in all such cases, basic principles are in conflict. The respondent has some rights which have accrued, through the passage of time, without the filing of a proper appeal. The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights.

It has been suggested that where counsel's mistake arises from carelessness, it should never be sufficient reason. I think this proposition is too wide. Mistakes normally arise through negligence where they do not arise from misinstruction. It can be said that counsel in the *Ngoni-Matengo Co-operative Marketing Union* case (*supra*) was negligent in not checking to see what order he had received. It would seem only prudent to see whether one has in fact received what one has ordered. The court administration may well be flattered by the assumption that what it issues is right, but this is hardly a prudent assumption.

I think the test suggested by Windham, J.A., is the more reliable. Was there a failure to appreciate the legal necessity for getting the order, or was there a lack of diligence in seeing that it was done in time? Here there was neither. There was a failure to realise that the order as drawn up by the court was not in proper form. This is clearly more serious than a failure to realise that it was not the correct order, but in my view this case falls under the heading of those in which counsel's error is not necessarily a bar to his obtaining an extension of time.

Accordingly, the application is granted as prayed. Time will be extended five days from the date hereof, to enable him to lodge his appeal in proper form. I would order that the costs of this application should be the respondent's in any event, as he is in no way responsible for what has happened. The application has been the result of the applicant's own error.

Order accordingly.

For the applicant:

Tahir Ali

Tahir Ali & Co, Dar-es-Salaam

For the respondent:

Jal Balsara

Sayani, Balsara & Velji, Dar-es-Salaam

[1968] 1 EA 225 (CAM)

Division: Court of Appeal at Mombasa
Date of judgment: 30 November 1967
Case Number: 26/1967 (41/68)
Before: Sir Clement de Lestang V-P, Spry and Law JJA
Sourced by: LawAfrica
Appeal from: High Court of Kenya – Wicks, J

[1] Currency – Devaluation – Rupee devalued after maturity of life insurance policy but before discharge signed – What rate of exchange into local currency to be applied.

[2] Insurance – Currency exchange – Sum insured three thousand Indian rupees – On maturity of policy entitlement to be paid in East African shillings – Rupee devalued – What is relevant date for exchange purposes.

Editor's Summary

The respondent was insured by the appellant company under a policy of life insurance for the sum of three thousand Indian rupees, maturing on June 1, 1966. The premiums were paid in East African shillings and it was the intention of the parties that on maturity the respondent would be paid his entitlement in Mombasa in shillings. The appellant company on June 1, 1966, wrote to their Mombasa office authorising them to issue a cheque for Shs. 4,500/- to the respondent on receipt of a duly executed discharge form and the policy. The cheque was dated June 1, 1966. The respondent did not return the executed discharge form and the policy until June 6; and in the meantime, at 11.30 p.m. on June 5, the rupee was devalued. The value of three thousand rupees dropped from Shs. 4,500/- to Shs. 2,856/20; the latter sum was tendered by the appellant company but the respondent refused to accept this as full payment of what was due on the policy, and sued for the Shs. 4,500/-. In the High Court the learned judge decided in favour of the respondent, and found that the date on which the rate of exchange was to be calculated was the date on which the sum assured was expressed by the policy to be payable, i.e. June 1. The appellant company appealed. The respondent argued that the policy was in effect a shilling policy payable in East Africa in East African shillings. For the appellant company it was argued that the date at which the amount due should be converted from rupees into shillings was not the date when a cause of action arose, i.e. June 1, but the date when the appellant company would have been contractually in default by non-payment, i.e. June 6.

Held – (per de Lestang, V.-P., and Law, J.A.; Spry, J.A., dissenting):

- (i) the policy was made in Bombay and expressed to be for a sum of three thousand rupees and was, on the face of it, a policy payable in foreign currency;
- (ii) in the case of a policy of insurance the relevant date for the purpose of calculating rates of exchange is the date when payment is due;
- (iii) the deferment of payment until a form of discharge is executed was irrelevant to the cause of action, which accrued on June 1, 1966, the date of maturity of the policy;

- (iv) the amount was due and payable on June 1, 1966, and the proper rate of exchange was the current rate at that date.

Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Syndic in Bankruptcy of Nasrallah Khoury v. Khayat*, [1943] 2 All E.R. 406.

- (2) *Anderson v. Equitable Assurance Society of the United State*: (1926), 134 L.T. 557.
- (3) *Di Ferdinando v. Simon, Smits & Co. Ltd.*, [1920] All E.R. Rep. 347.
- (4) *Owners of Steamship Celia v. Owners of Steamship Volturno*, [1921] 2 A.C. 544.
- (5) *Re United Railways of the Havana and Regla Warehouses Ltd.*, [1960] 2 All E.R. 332.
- (6) *Scott v. Bevan* (1831), 2 B. & Ad. 78; 109 E.R. 1073.
- (7) *Madeleine Vionnet et Cie. v. Wills*, [1939] 4 All E.R. 136.
- (8) *Cummings v. London Bullion Co. Ltd.*, [1952] 1 All E.R. 383.
- (9) *Muller Maclean & Co. v. Ataula & Co.*, I.L.R. (1924) 51 Ca. 320.

November 30, 1967. The following considered judgments were read:

Judgment

Law JA: The appellant is an insurance company incorporated in India and having a place of business in Mombasa. The respondent was insured by the appellant under a policy of life assurance which matured on June 1, 1966. The sum assured was stated in the policy to be three thousand Indian rupees. The premiums were paid in East African shillings, and it was the intention of the parties that on maturity the respondent would be paid his entitlement in Mombasa in shillings. This is clear from a letter dated May 21, 1966, sent by the appellant's head office to its Mombasa branch, which so far as is material reads as follows:

"The above policy matures for payment on 1.6.1966.

We now send herewith the necessary form of discharge and the letter addressed to the Life Assured in duplicate which please issue to the Assured immediately. On receipt of the discharge form duly executed Along with the policy, please satisfy yourself that discharge form is properly executed and that the policy has not been assigned or dealt with in any way and thereafter please issue the enclosed cheque in the name of Shri Savji Valji for Shs. 4,500/-."

The cheque was dated June 1, 1966, and was drawn on the Mombasa branch of the Bank of Baroda. A letter to the same effect was sent to the respondent and received by him before June 1. The respondent did not present himself at the appellant's office in Mombasa, with the duly executed form of discharge and the policy, until at the earliest the morning of June 6. Meanwhile at 11.30 p.m. on June 5, East African time, or 2 a.m. on June 6, Indian time, the rupee was devalued by the Government of India, and three thousand rupees henceforth became worth Shs. 2,856/20 instead of Shs. 4,500, the equivalent before devaluation. The appellants refused to pay to the respondent the sum of Shs. 4,500/- claimed by him and tendered the sum of Shs. 2,856/20 which the respondent refused to accept. When the suit out of which this appeal arises was filed, the respondents paid Shs. 2,856/20 into court. The policy describes the sum assured as becoming payable on the stipulated date of maturity, which was June 1, 1966, or at death if earlier. The issues in the court below were described by the learned trial judge as follows:

"... It is argued on behalf of the defendant that no debt was due and no cause of action arose until the plaintiff had proved his title to the satisfaction of the directors of the defendant, that this was not until June 13, 1966, which was after the devaluation of the rupee, and that the amount payable is the rate then applicable and that is the Shs. 2,856/20. It is argued on behalf of the plaintiff that by the express terms of the policy the sum assured became payable on June 1, 1966, that is before the devaluation of the rupee, that

proof of title is an administrative act which does not affect the date on which the sum assured becomes payable and the amount became payable and the amount is payable at the rate of exchange as on June 1, 1966, that is Shs. 4,500/-.”

I might at this stage mention that counsel for the respondent sought to argue that the policy, the subject of this appeal, was in effect a shilling policy payable in East Africa in East African shillings, the appellants having elected to treat it as such. This argument was not raised in the court below, nor was it made the subject of a cross-appeal; its effect is to support the judgment on other grounds and I do not think that this court should concern itself with it. I will content myself with saying that in my opinion the policy speaks for itself in this respect; it is expressed as having been made in Bombay for a sum assured of three thousand rupees, and it is on the face of it a policy payable in foreign currency, so that the question of the rate of exchange applicable when paid in shillings remains the main question for determination in this appeal.

The learned judge, in answering this question in the respondent’s favour, found that the date on which the rate of exchange was to be calculated was the date on which the sum assured was expressed by the policy to be payable, that is to say June 1, 1966. He relied in this particular on the case of *Syndic in Bankruptcy of Nasrallah Khoury v. Khayat* ([1943] 2 All E.R. 406). This case concerned, not an insurance policy, but promissory notes, and the question was whether they should be paid at the rate of exchange prevailing on maturity, or that prevailing at the date of payment. In delivering the judgment of the Board, Lord Wright said in the course of his speech (*ibid.* at p. 409):

“At what dates must the rate of exchange be calculated? . . . there are at least four different rules which might be adopted. The rate of exchange might be determined as at the date at which payment was due, or at the date of actual payment, or at the date of the commencement of proceedings, or at the date of judgment. English law has adopted the first rule, not only in regard to pay a sum certain at a particular date, but also in regard to obligations the breach of which sounds in damages, as for an ordinary breach of contract and also in regard to the satisfaction of damages for a wrongful act or tort.”

In the event, it was held that in the case of a bill or note, the correct date for calculating the exchange should be the date of maturity and not the date of actual payment.

Of the many cases cited to us by counsel for the appellant in support of his contention that the relevant date in the case of a policy of insurance is the date when there would be a breach of contract by reason of non-payment, as opposed to the date of maturity, not a single one concerned a policy of insurance. Counsel for the appellant’s general proposition is that no cause of action arises until there has been a demand for payment and a refusal, irrespective of the date of maturity. A case which did concern a policy of insurance, and in which the facts were very similar to the facts in this appeal, is *Anderson v. Equitable Assurance Society of the United States* ((1926), 134 L.T. 557), which concerned a policy of insurance which became payable in 1922 in German marks, on the death of the assured. The widow claimed that on a true construction of the policy she was entitled to payment at the pre-war rate of exchange, or in gold marks, but not at the rate prevailing in 1922, when one billion marks were equal to one shilling. The Court of Appeal was constrained to find against the widow, Bankes, L.J., remarking in the course of his judgment:

“In my experience, I have never heard the proposition challenged, that in an ordinary commercial contract where a person has entered into a

contract which is to be governed by English law and has undertaken an obligation to pay in foreign currency a certain sum in this country, that the true construction of that contract is that when the time comes for payment, the amount having to be paid in this country will be paid in sterling, but at the rate when payment is due.”

It will be seen from the above that both Lord Wright, in the case of promissory notes, and Bankes, L.J., in the case of a policy of insurance, considered the relevant date for the purpose of calculating rates of exchange to be the date when payment is due. In terms of the policy now under consideration, payment was due “on the stipulated date of maturity”, that is to say June 1, 1966, and this would seem sufficient to dispose of this appeal. But counsel for the appellant, relying on cl. 14 of the conditions of the policy, submitted that payment was not due until the assured gave satisfactory proof of his title. The relevant part of cl. 14 reads:

“By Maturity. In case of claim by maturity the payment is made by the Company on satisfactory proof of the title to the claim.”

Counsel for the appellant argued that nothing is due from the company until the assured has given satisfactory proof of identity, which in this case was not until after the rupee had been devalued. The learned judge held that this power to defer actual payment until satisfactory proof of identity did not alter the fact that the money was due, and the right of action arose, on maturity. I see no reason to differ from the learned judge on this point. In Bullen and Leake’s Precedents of Pleadings (8th Edn.), p. 212, it is stated in note (3) that:

“Upon the happening of the event insured against the insurer is bound to pay the agreed sum.”

That the happening of the event, and not a refusal of payment, provides the cause of action (in the learned editor’s opinion) is clear from the forms of plaint on pp. 213 and 214, when after stating the fact of the policy and the plaintiff’s interest therein, the cause of action is pleaded as follows:

“The said C.D. died on the ——— day of ———,”

followed by the claim for the amount assured. No demand and refusal to pay need be pleaded, as they are immaterial to the cause of action. In the same way I am of opinion that the power to defer payment until satisfactory proof of identity, or until a form of discharge is executed, is irrelevant to the cause of action, which accrued on the happening of the event. Satisfactory proof of identity may be a condition precedent to the act of payment, so that the insurance company can make sure that the money payable is paid to the person entitled; it does not affect the right of that person to the money. It is, as counsel for the respondent argued, a matter of defence not affecting the cause of action. If in this case the appellant had refused to pay the sum assured to the respondent, his plaint would have alleged, as basing his cause of action, that the sum assured was due and payable on June 1, 1966. It would be for the appellant to plead that it had not made payment because it was not satisfied as to the respondent’s identity, or because he had not completed the form of discharge. It could not, in my opinion, plead that the cause of action arose on any day other than June 1, 1966. It follows that in my opinion the amount was due and payable and the cause of action arose, on June 1, 1966, and that the rate of exchange applicable in this case is to be calculated as at June 1, 1966. The fact that actual payment was not made on that day seems to me, in the circumstances of this case, to be immaterial.

For these reasons I would dismiss this appeal.

Sir Clement De Lestang V-P: The respondent was insured with the appellant company under a policy of life insurance. The policy was for three thousand Indian rupees. It expressly provides for the payment of the sum assured by the company to the assured, his executors, administrators, assigns or nominees on the date of maturity. It matured on June 1, 1966. Its value in Kenya currency on that date was Shs. 4,500/- at the current rate of exchange. The policy also provides for the payment to be made at the head office of the company at Bombay, India, unless the company named an alternative place of payment and it is common ground that the company agreed to make the payment in Kenya in Kenya currency. Condition 14 of the schedule to the policy provides that “in case of claim by maturity the payment is made by the company on satisfactory proof of the title to the claim”. The policy itself provides that “proof of age of the life assured and of the title of the person or persons claiming payment shall be furnished to the satisfaction of the directors before payment of the sum assured”. Age was admitted in the present case.

A few days before the policy matured the company wrote to the respondent advising him of the forthcoming maturity and informing him that on the return to it of a discharge form, which was enclosed in the letter, duly executed, together with the original policy and proof of title it would issue its cheque for Shs. 4,500/- being the equivalent of three thousand rupees in full settlement thereof. In fact the cheque was prepared and ready for collection on June 1. The respondent took no steps to obtain payment until after the rupee was devalued during the night of June 5/6, 1966, when three thousand rupees became equivalent to Shs. 2,856/20. The company refused to pay more than Shs. 2,856/20 and the respondent brought an action.

The issue which the learned judge had to decide was, at what rate of exchange should the respondent be paid? He held that the sum assured was due and became payable on June 1, 1966, the date of maturity of the policy, that the cause of action arose on that day and that the rate of exchange applicable was that prevailing on that day. He accordingly gave judgment for the respondent for Shs. 4,500/- with interest and costs. The appellant appeals against this decision and the same point arises for decision by this court.

The pleadings do not clearly show whether the claim is for breach of contract or for debt. It is probably the latter and was treated as such by the court below but whatever it may be it is a well settled rule of English law that where damages for breach of contract or debt have to be stated in a foreign currency and then converted into sterling the conversion must be at the rate of exchange prevailing on the date of the breach of contract or at the date when the debt was due and payable as the case may be.

In so far as the damages for breach of contract is concerned the rule was applied in the following cases, to name only a few: *Di Fernando v. Simon, Smits & Co. Ltd.* ([1920] All E.R. Rep. 347); *Owners of Steamship Celia v. Owners of Steamship Volturno* ([1921] 2 A.C. 544); *Re United Railways of the Havana and Regla Warehouses Ltd.* ([1960] 2 All E.R. 332). In so far as debt is concerned it was applied in the following cases amongst others: *Scott v. Bevan* ((1831) 2 B. & Ad. 78); *Anderson v. Equitable Assurance Society of the United States* ((1926), 134 L.T. 557); *Madeleine Vionnet et Cie. v. Wills* ([1939] 4 All E.R. 136); *Syndic in Bankruptcy of Nasrallah Khoury v. Khayat* ([1943] 2 All E.R. 406); and *Cummings v. London Bullion Co. Ltd.* ([1952] 1 All E.R. 383). I do not propose to analyse these cases as there is no dispute as to the rule applicable. The rule which I have enunciated is relied on by the company and it is not questioned by the respondent.

Counsel for the respondent, however, sought to argue that although the original policy was for three thousand rupees payable in Bombay it had become as a

result of the election of the company a policy to pay Shs. 4,500/- in Mombasa and that consequently there was no room for the application of the rule. Election was neither pleaded nor argued in the court below and the learned judge not only made no reference to that doctrine but expressly found that the policy was in rupees and that the company only agreed to pay the equivalent in shillings. In these circumstances the respondent not having cross-appealed or sought the leave of this court to contend that the judgment should be affirmed on the ground of election, counsel for the respondent's arguments cannot be entertained (rule 65, Eastern African Court of Appeal Rules 1954).

The question whether when a debt is payable in foreign currency the appropriate form of action to recover it in the English courts is by way of a suit for damages for breach of contract was neither pleaded nor argued and I merely mention it in passing without expressing any opinion thereon.

It was not suggested that a different rule applies in Kenya and I entertain no doubt that the legal position is the same here as it is in England. The question for decision, therefore, is when was the debt due and payable?

It is abundantly clear from the terms of the policy itself that there was before the devaluation on June 1, a debt owed by the company to the assured or his successors in title. It is, however, contended that this debt was not payable until the respondent had completed the discharge form and proved his title to the satisfaction of the company, and that until then the debt was debitum in praesenti solvendum in futuro and that the position is identical as that in *Cummings'* case (*supra*). I am unable to accept this contention. The present case is clearly distinguishable from *Cummings'* case. In the present case the sum assured was payable on June 1 and had the assured presented himself at the company's office in Mombasa on that day with the discharge form completed and the policy he would not and could not have been refused payment by the company. In the *Cummings* case payment could not be made as it was unlawful to do so until the permission of the Treasury had been obtained. The provisions of the policy empowering the company to withhold payment until the assured had done certain things cannot be classified as conditions precedent to the accruing of the company's liability. Indeed they only come into play after liability has been established and cannot affect the company's liability at all in the present case as the respondent had done everything he was required to do under the contract to entitle him or his successor in title to payment of the sum assured. They are mere formalities concerning the handing over of the money which should be ignored in ascertaining the date when payment was due. That the debt was payable on June 1 is not only clearly expressed in the policy itself but is also borne out by the fact that on that day the company had its cheque for Shs. 4,500/- ready for handing over to the respondent. In these circumstances to hold that the debt was not due and payable on June 1 would, in my view, be contrary to common sense.

For these reasons I would dismiss this appeal and, as Law, J.A., agrees, the appeal is dismissed with costs and with a certificate for two counsel.

Spry JA: I have had the advantage of reading in draft the judgments of de Lestang, V.-P., and Law, J.A., but regret that I am unable to agree with their conclusion.

Put in its simplest form, the position would appear to be that on June 1, 1966, a debt became due from the appellant company to the respondent, although payment could be deferred until certain conditions had been complied with. It was a debt expressed in terms of a foreign currency, that is to say, Indian rupees, but intended to be paid in Mombasa in shillings. Between the date when the debt fell due and the date when the contractual conditions were satisfied, the Indian rupee was devalued. The question for decision is whether the appellant

company is liable to pay the debt at the rate of exchange prevailing before or after devaluation.

Counsel for the appellant company, submitted that the learned trial judge had erred in deciding that the date at which the amount due should be converted from rupees into shillings was the date when a cause of action arose, that is, June 1, 1966, and not the date when the appellant company was contractually in default by non-payment, which was, at the earliest, June 6, 1966.

No East African authority was cited to us on this aspect of the case, and I am not aware of any. The law applicable to the contract is the Indian Contract Act 1872, since the policy of assurance was taken out before the commencement of the Law of Contract Act (Cap. 23). However, there is, so far as I am aware, nothing in the Indian Contract Act that bears on the question, and I am not aware of any Indian case that assists, although *Muller Maclean & Co. v. Ataulla & Co.* (I.L.R. (1924), 51 Ca. 320) indicates that the courts in India apply the English law on the subject.

Under English law, it would seem that where a debt is payable in a foreign currency, the appropriate form of action to recover it in the English courts is by way of a suit for damages for breach of contract, since judgment cannot be obtained in the English courts for money expressed otherwise than in sterling. This appears clearly from the opinion of Lord Radcliffe in *Re United Railways of the Havana and Regla Warehouses, Ltd.*, when he said ([1960] 2 All E.R. at p. 350):

“I take it myself that any contract to settle a debt in the currency of the country in which the settlement is to be made is a contract for the payment of money in the eyes of our law, and this notwithstanding the fact that, if action is taken in England for breach of the contract, the remedy sought must be damages, not debt, and those damages expressed in sterling for the purposes of judgment.”

Then, after referring to the differences between a contract to pay money abroad in satisfaction of a debt and a contract to deliver foreign currency in England or abroad or a contract to exchange the currency of one country for the currency of another, he continued:

“Each of these transactions has some difference from the other and may for some purposes have different consequences; but the important point for the present purpose is that each of them has the common characteristic that, if sued on in England, it must be sued for in damages expressed in sterling as on a breach of contract.”

Lord Denning, in the same case, said (*ibid*, at p. 356):

“Now the respondents come to the courts in England to recover the sums in arrear and unpaid. And if there is one thing clear in our law, it is that the claim must be made in sterling and the judgment given in sterling. We do not give judgment in dollars any more than the United States courts give judgments in sterling. But the question is, at what date is the rate of exchange to be taken? . . . If the respondents had sought to recover judgment in the United States, they would, I presume, have been able to sue there for a *debt* in dollars. But they cannot sue here in *debt*. There is no sterling debt. Their claim must be in damages. They must claim *damages* for breach of contract because of the non-payment of dollars in the United States. As such, the claim is indistinguishable in principle from any claim for breach of contract. The rate of exchange is to be taken at the time when the breach took place.”

The *United Railways* case was not, of course, concerned with life assurance. It did, however, lay down a principle which applies, I think, to the present appeal. It is not, of course, binding on us but it must, I think, have a high persuasive value both because of the very fully reasoned opinions given and because the Indian Act was based upon and was to a large extent a codification of English law. I respectfully agree with de Lestang, V.-P., that the law of Kenya on this subject must be taken to be the same as the law of England.

I do not think that the case of *Anderson v. Equitable Assurance Society of the United States* ((1926), 134 L.T. 557) is of any great assistance and I would only comment on it that when Bankes, L.J., said at p. 563 that the rate of exchange should be that applicable “on the day of payment”, he must, I think, be taken to have meant the day when payment should have been made, as he himself had earlier said and as was said by Warrington, L.J. In that case it would appear that it was immaterial whether the rate of exchange adopted was that of the date of maturity or the date when payment should have been made, and the court consequently did not find it necessary to distinguish between these dates.

If it be accepted, and for myself I would accept, that the respondent could only sue for damages for breach of contract and that those damages had to be expressed in shillings and that the date as at which the rate of exchange was to be determined was the date of the breach, it remains to consider whether there was any breach of contract by the company. As a general rule, of course, a debtor is under a duty to seek out his creditor when the debt falls due for payment. In the present case, the company approached the respondent before the date of maturity of the policy and informed him that payment would be made on that date if he produced the policy of assurance, as evidence of title, together with a discharge voucher. Under a clause of the policy, payment was to be made “on satisfactory proof of the title to the claim” and it has not seriously been argued that the company’s requirements were unreasonable. In my view, the debt, although due on June 1, was not payable until the company’s requirements were met or at least until a reasonable excuse was given for non-compliance. In fact, the requirements were met on June 13 and it was on that date that the respondent became entitled to payment and it is as at that date, in my opinion, that the rate of exchange has to be determined. The company admitted an obligation to pay Shs. 2,856/20 and paid that amount into court. I have considerable sympathy for the respondent but I think that is all that he can recover. I would have allowed the appeal.

Appeal dismissed.

For the appellant:

SK Kapila

SK Kapila, Nairobi

For the respondent:

PJ Wilkinson, QC and *CK Kanji*

AB Patel and *Patel*, Mombasa

Konig v Kanjee Naranjee Properties Ltd
[1968] 1 EA 233 (CAN)

Division:

Court of Appeal at Nairobi

Date of judgment: 20 December 1967
Case Number: 46/1967 (53/68)
Before: Duffus, Spry and Law JJA
Sourced by: LawAfrica
Appeal from: High Court of Kenya – Mosdell, J

[1] Damages – Master and servant – Breach by servant – What damages master entitled to set off against claim by servant for salary.

[2] Master and servant – Dismissal – Salary – Whether servant entitled to arrears of salary on dismissal – Whether for completed periods of service only.

[3] Master and servant – Dismissal – Summary dismissal for misconduct – Refusal to obey order to return to work after dispute – Whether order reasonable – Whether dismissal justified – Whether servant entitled to demand payment of salary due as condition of returning to work.

Editor’s Summary

The appellant was employed by the respondent as engineer and manager of a sisal fibre spinning factory by a written contract for three years from March, 1965, at a monthly salary of Shs. 5,000/- payable on the last day of each month. He was entitled under the contract to certain local leave to “be taken at such time or times as may be convenient to” the respondent. On June 28, 1966, as a result of an incident the previous day, there was a stormy interview between the appellant and the managing director of the respondent during which the managing director invited the appellant to resign and, when the appellant refused, lost his temper and abused the appellant. The appellant then wrote to the respondent, pointing out that his local leave was overdue and stating that he would take it from June 29 and would resume work on July 13. On July 4, the respondent replied saying that it was not convenient to it for the appellant to take his local leave at that time and ordering him to return to work forthwith. There then followed correspondence between advocates for the parties and on July 20 the respondent’s advocates wrote saying that the appellant’s contract was “hereby terminated summarily”. The respondent did not pay the appellant his salary for June. The appellant sued for damages for wrongful dismissal. The respondent alleged that he had been summarily dismissed on July 20 for disobedience to orders. The High Court dismissed the claim, holding that the appellant was in breach of his contract as from June 28. On appeal the appellant argued that the dismissal was wrongful and that in any event he was entitled to his salary up to the date of dismissal. The respondent cross-appealed on certain set-offs claimed by it but disallowed below.

Held –

- (i) a master is entitled to dismiss his servant summarily for wilful disobedience of his master’s lawful and reasonable orders, which it is his duty to obey;
- (ii) the order to return to work of July 4 was clearly a lawful and reasonable order;
- (iii) therefore the dismissal was rightful;
- (iv) although a servant is entitled to arrears of salary on dismissal this entitlement only applies to

completed periods of service – in this case a month;

- (v) the appellant was in any case entitled to his June salary because the misconduct relied on did not occur until July 4;

- (vi) (per Duffus and Spry, JJ.A.) the appellant was not justified in demanding his June salary before returning to work.

Appeal allowed in part. Judgment for the appellant (after taking into account a set-off) for Shs. 3,425/- with costs thereon below and half costs of appeal. Cross appeal allowed in part with half costs.

Case referred to:

- (1) *Healey v. Société Anonyme Française Rubastic*, [1917] 1 K.B. 946.

December 20, 1967. The following considered judgments were delivered.

Judgment

Law JA: The appellant, a textile engineer, was employed by the respondent company as engineer and manager of a sisal fibre spinning factory under an agreement in writing executed on March 15, 1965, for the term of three years from March 1, 1965. The agreement provided *inter alia* for a monthly salary of Shs. 5,000/- payable on the last day of each month of service and for three months paid leave on completion of the full term of three years' service, together with air passages to Germany for the appellant and his wife. As regards local leave, para. 5 (d) of the agreement provided that:

“The employee shall be entitled to two weeks local leave on full pay in respect of each year of his service except in the year in which he shall take overseas leave as hereinafter mentioned. All such leave including overseas leave shall be taken at such time or times as may be convenient to the company.”

In June, 1966, the appellant had served the company for a year and three months, but had not been granted any local leave except for a few hours on a day in January, 1966, when he visited a game park.

On June 27, 1966, the shift supervisor in charge of the second shift at the factory fell ill. The appellant informed the respondent company's managing director Mr. Dwarkadas by telephone that there was trouble at the factory.

Mr. Dwarkadas said he would go to the factory later, but according to him he telephoned at about 4 p.m. and found that the appellant had sent the second shift home and closed the factory for the day. Mr. Dwarkadas was obviously most displeased, and on the next day called the appellant to his office, where at about 3 p.m. a stormy interview took place between the two men. Mr. Dwarkadas invited the appellant to resign, and handed him a typed letter expressed as accepting his resignation, and asked him to sign it by way of acknowledgement. The appellant refused to sign the letter, or to offer his resignation. Mr. Dwarkadas lost his temper and grossly abused the appellant, who left the office and went home. The appellant then wrote a letter to the respondent company, pointing out that his local leave was four months overdue, and stating that he was taking his local leave with effect from June 29 and that he would resume work on July 13. To this Mr. Dwarkadas replied by a letter dated July 4 in which he said that it was not convenient to the company for the appellant to take his local leave at that time because of an uncompleted export order, and ordered him to return to work forthwith. By the time the appellant received this letter, he had already consulted advocates, who wrote to the respondent company setting out the appellant's claims. Mr. Dwarkadas then consulted his own advocates, who on July 20 wrote to the appellant's advocates informing them *inter alia* that the appellant's contract was “hereby terminated summarily”, because of two “grave breaches of contract”. These breaches were described as follows:

“ ‘Your client had left the factory without permission at about 3 p.m. on June 27, 1966 and ‘by July 6 your client was already in breach of the contract by being absent without leave’.”

On September 23, 1966, the appellant filed his plaint claiming damages for wrongful dismissal, including three months’ salary in lieu of notice. The respondent company filed a defence alleging that the appellant was dismissed summarily on July 20 for “failing to obey the lawful and reasonable orders of the defendant its servants or agents”, in that he failed to obey Mr. Dwarkadas’ order to return to work contained in his letter of July 4, 1966. The respondent company also claimed to be entitled to set-off two items, the first being Shs. 2,640/- the cost of flying out a new general manager from Ireland to Kenya, to replace the appellant, and the second being mesne profits in respect of the respondent company’s flat, occupied by the appellant, at Shs. 525/- a month from August 1, 1966, until vacant possession given, which was in fact given on November 4, 1966.

The learned trial judge dismissed the appellant’s suit, holding that he was “in breach of the contract as from June 28, 1966” and that the respondent company was justified in withholding the appellant’s June salary “as insurance against possible damages flowing from such breach”. As he had awarded the appellant no damages at all, the judge did not feel it necessary to deal with the set-offs. The better course, in a case such as this, is for the judge to make a finding on the set-offs in the event of a successful appeal against the dismissal of the suit.

The main grounds of appeal argued by counsel for the appellant were that the learned trial judge erred in holding that the appellant’s conduct justified his summary dismissal, and that even if his summary dismissal was justified, he was entitled to his salary up to the date of his dismissal. As regards the first point, the law seems clear. A master is entitled to dismiss his servant summarily for wilful disobedience of his master’s lawful and reasonable orders, which it is his duty to obey. In this case, the appellant was only entitled to take local leave “at such time or times as may be convenient to the company”. He took local leave on June 28 without ascertaining if it was convenient to the company. On July 4 Mr. Dwarkadas wrote to the appellant, pointing out that it was not convenient to the company for the appellant to take his leave at that time and ordering him to return to work forthwith. That was clearly a lawful and reasonable order, and by disobeying it the appellant rendered himself liable to summary dismissal. In my opinion, the respondent company was within its rights in dismissing the appellant summarily on July 20, 1966, and I consider that the first ground of appeal must accordingly fail. In support of his alternative submission that the appellant was in any event entitled to his salary up to the date of dismissal, counsel for the appellant referred to the case of *Healey v. Société Anonyme Française Rubastic* ([1917] 1 K.B. 946) the headnote whereof reads:

“A servant dismissed for misconduct is entitled to recover arrears of salary due to him.”

If however the judgment of Avory, J., in that case is read carefully, it will be seen that the entitlement to arrears of salary only applies to completed periods of service. Such periods are normally computed with reference to the method of payment of salary, in this case monthly at the end of each month. The trial judge found that the appellant was in breach of his contract as from June 28, when he absented himself without leave. But that was not the misconduct pleaded by the respondent company as justifying summary dismissal. The misconduct relied on was the appellant’s disobedience of Mr. Dwarkadas’ order to return to work contained in his letter of July 4, and in my opinion the judge was not entitled to go outside the pleadings in this respect. In my view the appellant was clearly entitled to his June salary, and I would allow this appeal

the extent of setting aside that part of the judgment dismissing the appellant's suit, and directing instead that judgment be entered for the appellant for Shs. 5,000/- subject to consideration of the set-offs to which I have referred above.

Counsel for the respondent company conceded in argument before us that the appellant was entitled to judgment for his June salary, and cross-appealed in respect of the two set-offs which the trial judge had not considered. In the normal course of events the question of the set-offs would be remitted to the High Court for decision, but I understood both counsel to agree that, to save further costs and delay, they were willing to leave the adjudication on the set-offs to this court. All the evidence relating to them is on record, and we have heard full argument on the subject from both sides.

The first set-off alleges that by reason of the appellant's breach of contract the respondent company was deprived of a manager for its factory and has suffered special and general damages. As regards general damages, there is not a shred of evidence that the respondent company suffered any ascertainable loss by reason of the appellant's dereliction of duty, and I would award nothing under this head. As regards special damages, the respondent company claims the cost of flying out a new manager from Ireland to Kenya. This new manager was Mr. Dhrona, a young nephew of Mr. Dwarkadas, who was at the time undergoing instruction in an Irish textile mill at the respondent company's expense, and whose fare to Kenya would in any event have been paid by the respondent company had he not been recalled prematurely. I can see no good reason for making the appellant responsible for reimbursing this item of expenditure. As regard the second set-off, which claims mesne profits in respect of the flat occupied by the appellant, counsel for the appellant does not dispute the appellant's liability for a reasonable sum under this head. The appellant was dismissed on July 20, 1966, and remained in occupation until November 4, 1966, a period of three and a half months. It has not been suggested that the rent claimed as mesne profits, that is to say Shs. 525/- a month, is unreasonable. In the circumstances of this case, I consider that fifteen days' notice to vacate the premises would have been reasonable, as the appellant was only entitled to possession in his capacity as manager of the factory, and I would award Shs. 1,575/- under this head.

In the event, I am of the opinion that the appellant is entitled to judgment for Shs. 3,425/-, and I would direct that the decree be altered accordingly. In addition, he should have such costs of the action as are appropriate in the High Court having regard to the amount of the judgment. As regards the costs of this appeal, the appellant has only succeeded to a very limited extent, but, as counsel for the appellant pointed out, he had to appeal in order to obtain even that limited redress. I would order that the respondent company pay half the costs of the appeal. In the same way, the cross-appeal has only partly succeeded, and I would order the appellant to pay half the costs attributable to the cross-appeal.

Duffus JA: The facts relating to this appeal have been fully set out in the judgment of Law, J.A., which I have had the advantage of reading in draft. The trial judge found as a fact that the appellant's taking of his local leave was in breach of his contract. In my view the learned judge was on the evidence before the court justified in his findings. It does appear that the appellant took his leave as a result of the quarrel he had with Mr. Dwarkadas, a director of the respondent company and in direct disobedience to Mr. Dwarkadas' express refusal to grant leave. The effect of the appellant's act would be that he was absent from his work without leave and liable to instant dismissal by the respondent company. The respondent company did not however exercise its right but rather waited to allow the appellant an opportunity to return to his work. The

respondent company did not however waive or condone the appellant's misconduct. The position as appears from the correspondence, and in particular from the respondent company's letter of July 4, 1966, is that the respondent company was willing to condone the appellant's offence if he returned to work immediately in obedience to the instructions given to him in that letter.

The learned judge found that there had been a waiver, but as he went on to find that the appellant's breach of contract always continued due to his failure to return to work, it would appear that his Lordship was, in effect, finding that this was only an offer to waive the appellant's breach which was never accepted as the appellant refused to return to work.

The position then, as I see it, is that the appellant continued to be in the respondent company's service until his summary dismissal by the letter from the advocates of the respondent company dated July 20, 1966. Up to the date of this letter the appellant had made no attempt to return to his work and in fact he had by his advocates' letter of July 11, 1966, stated quite definitely that he would not return to work until his salary for the month of June was paid. The learned judge with respect appears to have over-looked the fact that the defence justified the appellant's summary dismissal not on the fact that he had wrongly gone on leave on June 28, 1966, but on the fact that he had refused to obey the respondent company's instructions to return to work as contained in the letter of July 4, 1966. The judge appears to have found that the dismissal was justified on the basis that the appellant had wrongly gone on leave of absence on June 28, 1966. There can be no doubt that the appellant refused to obey his instructions to return to work and indeed refused in any event to return to work unless and until his June salary was paid. This would amount to such a complete denial of his contract of service as would clearly justify his instant dismissal, unless his demand to be first paid June salary was justified.

The whole question then would appear to depend on this withholding of the appellant's June salary by the respondent company. This salary was payable, according to the contract, at the end of June and ordinarily an employee would be justified in regarding the refusal to pay salary when due as a breach of contract, but in this instance the trial judge has found that the appellant had improperly taken his leave and would in effect have been absent from his work without excuse as from June 28, 1966. The respondent company could have treated his absence from duty as sufficient misconduct to justify instant dismissal on June 28, 1966, and in this event the appellant would not have been entitled to any salary for the month of June. The respondent company however elected to treat the contract for service as still subsisting although they did not condone the appellant's misconduct but rather offered him the opportunity of having his misconduct condoned on his immediate return to work. After some consideration I agree with the view expressed by Spry, J.A., in his judgment. The appellant could have elected to treat the withholding of his June salary as a sufficient breach to put an end to the contract, but he did not do so but rather demanded payment before he returned to work. In other words both parties up to this stage regarded the contract as still subsisting, and the employee was not therefore justified in demanding his June salary before he returned to work, and his refusal to return to his work was such conduct as to justify his summary dismissal by the letter of July 20, 1966.

Counsel for the respondent concedes that the appellant is entitled to be paid his salary for June, less any amount that the respondent company can claim by way of a set off. I agree with Law, J.A., for the reasons that he states, that the appellant is not entitled to any salary in respect of July.

I entirely agree with the judgment of Law, J.A., on the question of the set-off and the amount to be allowed. I agree therefore, that judgment be entered for

the appellant in the sum of Shs. 3,425/- and I also agree with Law, J.A., on the matter of costs. As Spry, J.A., also agrees, there will be an order on the appeal and on the cross-appeal on the terms set out by Law, J.A.

Spry JA: I have had the advantage of reading in draft the judgment of Law, J.A., with which I agree and there is little that I wish to add.

This appears to me to have been a case where there were breaches of contract on both sides. I think that the appellant was in breach of contract when he deliberately stayed away from work on June 28 but the respondent company did not choose to exercise its rights. I think the respondent company was in breach of contract when it withheld the appellant's June salary but there again the appellant did not exercise his rights. Both parties preferred to negotiate. The first positive action of a legal nature was when the respondent company on July 4 gave the appellant three months' notice under the terms of the contract, with an order to return to work. This letter seems to me clearly to recognize that the contract was still in existence. It did, however, contain an implicit threat of summary dismissal if the appellant did not return to work. The appellant did not return and it was this breach of contract that justified the dismissal of the appellant. I do not think the withholding of the June salary, wrongful as it was, provided any excuse for not returning to work unless the appellant had elected to rescind the contract, which he did not do.

In all other respects, I agree with the judgment of Law, J.A., and with the order he proposes.

Appeal allowed in part with costs in the High Court and half the costs of the appeal. Cross-appeal allowed in part with half the costs attributable to the cross-appeal.

For the appellant:

KB Keith

Kaplan and Stratton, Nairobi

For the respondent:

PJS Hewett

Daly and Figgis, Nairobi

Anyangu and others v Republic **[1968] 1 EA 239 (CAN)**

Division:	Court of Appeal at Nairobi
Date of judgment:	29 March 1968
Case Number:	5/1968 (55/68)
Before:	Sir Charles Newbold P, Sir Clement de de Lestang V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Mosdell, J

[1] Criminal Law – Evidence – Confession – Admissibility of and weight to be given to against co – accused in joint trial.

[2] Criminal Law – Evidence – Extra-judicial statement – Admissibility of, as against co – accused, where statement does not amount to confession – Whether evidence against maker only.

[3] Criminal Law – Evidence – Judges’ Rules – Whether applicable as rule of practice in Kenya – Discretion of judge to disregard – Whether 1964 Judges’ Rules or previous Rules applicable.

Editor’s Summary

The four appellants were convicted of murder in the High Court under s. 21 of the Penal Code, the judge concluding that the killing was a probable consequence of a burglarious expedition in which the appellants were engaged as members of an armed gang. The evidence against three of the appellants that they were members of the gang consisted solely of statements made by them to a police officer before being charged. At the trial the admissibility of these statements was objected to on the ground that they were obtained in breach of the Judges’ Rules. The judge, however, admitted the statements and treated them as accomplice evidence against each appellant.

Held –

- (i) whether or not the Judges’ Rules were strictly observed, the statements were properly admitted. The Judges’ Rules are only rules of practice and it is always in the discretion of the trial judge to allow statements made by accused persons although they are not obtained strictly in accordance with the Rules;
- (ii) a statement which does not amount to a confession is only evidence against the maker of it;
- (iii) the statements were not confessions and were only evidence against their makers;
- (iv) nevertheless the convictions were proper;
- (v) it is the Judges’ Rules in force in England before 1964, and not the 1964 Rules, which apply in Kenya.

Observations on admissibility of confessions against co-accused in joint trial.

Appeals dismissed.

Cases referred to in judgment:

- (1) *Anyuna s/o Omolo and Another v. R.* (1953), 20 E.A.C.A. 218.
- (2) *Gopa s/o Gidamebanya and Others v. R.* (1953), 20 E.A.C.A. 318.
- (3) *Jatan Jarso Gade and Another v. Republic* (Court of Appeal), Criminal Appeal No. 232 of 1965 (unreported).

Judgment

Sir Clement De Lestang V-P: delivered the following considered judgment of the court: During the

night of December 17/18, 1966, a gang of

burglars armed with offensive weapons broke into the house of Nifa Alusano in the village of Mulwanda, Kakamega district. They used violence towards Nifa and her daughter who was staying with her at the time and in the words of the learned trial judge “stripped the house of all its portable contents”. Immediately before this the gang had broken into Nifa’s son’s house close-by. The two women raised an alarm and two persons came from a nearby village to assist. These two men came upon the gang near the gate of Nifa’s compound and were attacked by them. One managed to run away but the other Alucho Ombango was struck with pangas and sticks and killed. The four appellants were tried and convicted of his murder. They appealed against their convictions.

The evidence did not establish who inflicted the fatal injury on the deceased nor who took part in the assault on him. The learned trial judge correctly directed himself that in these circumstances the members of the gang could be convicted of murder only if s. 21 of the Penal Code applied, that is to say, that the commission of murder was a probable consequence of the prosecution of the common purpose of the gang which was clearly burglary. Having regard to the fact that the gang was armed with pangas, a hammer, sticks and torches and that violence was actually used he concluded that the killing was a probable consequence of the burglarious expedition and that s. 21 of the Penal Code applied. With this conclusion we respectfully agree and no arguments to the contrary have been addressed to us.

Nevertheless before the appellants could be convicted of murder the Republic had to prove beyond reasonable doubt that they were members of the gang. The evidence that they were is to be found in the case of the first, second and fourth appellants solely in a statement which each of them made to the police officer investigating the offence before he was charged and in the case of the third appellant a statement which he made in like manner together with evidence that he was in possession of some of the stolen property very soon after the burglary. The statements were objected to at the trial on the ground that they were obtained in breach of the Judges’ Rules and although it is not clear whether or not the learned trial judge was satisfied that there had been a contravention of the Judges’ Rules he admitted the statements in evidence. It was contended before us that he exercised his discretion wrongly. Whether or not the Judges’ Rules were strictly observed we are satisfied that the statements were properly admitted. It is important to remember that the Judges’ Rules are only rules of practice and it is always in the discretion of the trial judge to allow statements made by accused persons although they were not obtained strictly in accordance with the rules. Indeed we think that in the circumstances of this case the judge could not have exercised his discretion differently. It is the treatment of the statements by the learned trial judge which has caused us some concern. The learned judge treated all the statements as evidence, albeit accomplice evidence, against each appellant. With respect in doing so he was in our view in error. A statement which does not amount to a confession is only evidence against the maker. If it is a confession and implicates a co-accused it may, in a joint trial, be “taken into consideration” against that co-accused. It is, however, not only accomplice evidence but evidence of the “weakest kind” (*Anyuna s/o Omolo and Another v. R.* (1953), 20 E.A.C.A. 218); and can only be used as lending assurance to other evidence against the co-accused (*Gopa s/o Gidamebanya and Others v. R.* (1953), 20 E.A.C.A. 318).

A statement is not a confession unless it is sufficient by itself to justify the conviction of the person making it of the offence with which he is tried. Applying this test the statements in the present case were not confessions and consequently evidence only against their makers. That being the position we have had to consider whether independently of the statements of his other co-accused there was sufficient evidence to justify the decision against each appellant and also

whether a court properly directing itself on the evidence could have failed to convict.

As regards the third appellant, as we have said before, his participation in the burglarious expedition is fully corroborated by his possession of some of the stolen property, and it is impossible to imagine any court holding that he was not a member of the gang.

As regards the first, second and fourth appellants we think that their statements correspond closely to what actually happened at the burglary that no court could have had any doubt that each of them took part in it, especially as none of these appellants either gave evidence or made an unsworn statement at the trial or sought either to retract or to repudiate his statement. Since, as we have said before, the commission of murder was a probable consequence of the armed burglary each member of the gang was by virtue of s. 21 of the Penal Code rightly convicted of murder. Their appeals are accordingly dismissed.

Before leaving this case there is one matter to which we wish to refer. Some doubts have been expressed as to which of the Judges' Rules are applicable, the old rules or the 1964 rules. The learned trial judge in the present case, while conceding that there was scant authority for his view leant in favour of the 1964 rules. In *Jatan Jarso Gade and Another v. Republic* (Criminal Appeal No. 232 of 1965 (unreported)) this court said:

“... They (the 1964 rules) are rules of practice which have not been adopted by the judges in Kenya, and which form no part of the law or practice applicable to the criminal courts in Kenya. The ‘Judges’ Rules’ in force in England before 1964 have, however, been adopted in Kenya and still represent the practice to be followed in the criminal courts in Kenya.”

Appeals dismissed.

For the appellants:

SN Waruhiu

Waruhiu & Co, Nairobi

For the respondent:

JE Kamau-Thima (State Counsel, Kenya)

Attorney-General, Kenya

Tejani and another v Life Insurance Corporation of India [1968] 1 EA 242 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	2 February 1968
Case Number:	424/1963 (23/68)
Before:	Sheridan J
Sourced by:	LawAfrica

[1] *Contract – Payment – Payment by cheque through post of premium on life policy – Observations as to effect of.*

[2] *Insurance – Life policy – Premium paid by cheque dated before but received after the insured's death – Whether insurance policy lapsed – Usage to accept payment of premium by cheque.*

Editor's Summary

The plaintiffs were the administrators of the estate of the deceased, whose life was insured under an insurance policy with the defendant insurance company. The plaintiffs notified the defendant of the insured's death, which had occurred on January 31, 1963, by letter on February 7, 1963; but the defendant repudiated liability to pay the agreed bonus of Shs. 25,000/- on the ground that the premium of Shs. 1,275/- due on January 28, 1963, was not received by it until February 4, 1963. The plaintiffs claimed that the premium was paid by a cheque drawn by one of the plaintiffs on the Standard Bank in Kampala and posted to the defendant correctly addressed on January 21, 1963. The cheque was presented for payment by the defendant company on February 5, 1963. The defendant stated that the cheque was received by it on February 4, 1963. At the deceased's funeral on February 1, 1963, Mr. Gore, the defendant company's Masaka manager, stated that he had a conversation with the deceased's mother-in-law, in the course of which Mr. Gore was informed that due to an oversight a premium on the deceased's policy was not paid. The defendant company tendered repayment of the sum of Shs. 1,275/- paid to it on February 5, 1963.

Held –

- (i) that, on the evidence, the cheque was posted after the deceased's death and was received on February 4, 1963; and
- (ii) that the policy was not subsisting on January 31, 1963.

Observations –

- (i) as a general rule, a debtor must seek out and pay his creditor; and an assured, if he chooses for his own convenience to send money in any form through the post, does so at his own risk;
- (ii) it was the defendant's sanctioned usage to receive payment by cheque;
- (iii) there was no evidence that the defendants had made the post office their agent for acceptance of premiums so that the deceased's debt would have been discharged by posting a letter containing a cheque duly addressed to the defendants.

Suit dismissed with costs.

Cases referred to in judgment:

- (1) *Pennington v. Crossley & Son* (1897), 77 L.T. 43; 13 T.L.R. 513.
- (2) *Tankexpress A/S v. Compagnie Financière Belge des Petroles S.A.*, [1948] 2 All E.R. 939; [1949] A.C. 76.

Judgment

Sheridan J: By a plaint dated August 3, 1963 the plaintiffs, as executors and administrators of the will of Bandali Dharamshi Tejani (deceased), are claiming Shs. 25,000/- plus a bonus of Shs. 320/- under a

policy of life insurance No. 2600223 dated February 3, 1962 (Exhibit A) and made between the deceased and the defendants, who carry on business of life insurance in Uganda, in consideration of the premiums paid and to be paid by him to them upon the terms mentioned therein. On proof of the deceased's death the defendants agreed to pay Shs. 25,000/-, plus any bonus accrued, to the executors and administrators.

On January 31, 1963, the deceased died at Mulago Hospital, Kampala. The main controversy in the suit is whether the policy was still then in force.

The relevant allegations are set out in paras. 5 and 6 of the plaint as follows:

- “(5) The plaintiff duly notified the defendants of the death of the said Bandali Dharamshi Tejani by letter dated February 7, 1963, but the defendants have repudiated liability on the ground that the premium of Shs. 1,275/- due on 28.1.1963 within thirty days of grace was not received until 4.2.1963.
- (6) The said premium was paid by cheque No. 26099 drawn by Hyderali Dharamshi Ltd. on the Standard Bank in Kampala and posted to defendant correctly addressed on January 21, 1963. It is the normal custom of the defendant to receive payment by cheque and pursuant to such custom the first premium for Shs. 1,275/- was paid by cheque No. A41651 of 29.12.61 drawn by the deceased Bandali Dharamshi Tejani. The said cheque No. 26099 would in the normal course of post arrive at defendant's office in Kampala not later than January 23, 1963, and payment was therefore made upon the said January 23, 1963. The said cheque was received by defendant and was presented for payment and paid on February 5, 1963, and the value thereof has not been repaid.”

In their written statement of defence the defendants deny:

- (1) that the policy was in force on January 31, 1963;
- (2) that the cheque was posted on January 21. They contend that it was posted after the deceased's death;
- (3) that it was their normal custom to receive payment of premium by cheque;
- (4) that they ever sanctioned or authorized the deceased to pay the premium by cheque;
- (5) that they ever expressly or impliedly sanctioned or authorized the deceased to remit the premium by post.

Finally, in paras. 11 and 12 they allege:

- “11. The defendant states the said cheque No. 26099 for Shs. 1,275/- was received through post at its office in Kampala on February 4, 1963, after the said policy of insurance had lapsed without acquiring any value as the second yearly premium due on December 28, 1962, was not paid within the time stipulated in the said policy.
12. The defendant admits that the said cheque No. 26099 for Shs. 1,275/- was presented by it for payment on February 5, 1963, but that such payment was received without prejudice to the defendant's right under the said policy of insurance to treat the said policy of insurance as lapsed without acquiring any value. A true copy of the deposit memorandum acknowledging the receipt of the said payment is annexed hereto and marked 'DA'. In any event the defendant would contend that since the said insured died on January 31, 1963, payment towards premium after that day was of no effect. The

defendant is holding the said sum of Shs. 1,275/- in deposit for and on account of the estate of the said insured and is prepared and willing to release it to the said estate.”

On April 2, 1964, when the suit came on for hearing the following issues were agreed:

- (1) When was the cheque posted?
- (2) When was it received?
- (3) Was the policy subsisting on January 31, 1963?
- (4) Is it the normal custom to receive payment by cheque?
- (5) Did the defendants become liable on the plaintiffs posting the cheque as alleged?

As for various reasons the hearing of the suit has spread over nearly four years it is desirable to set out the evidence in some detail before evaluating it. Mr. Abdul Nanji Dhamani lives at Mukoko, near Masaka. He is an accountant for Wanoni Farmers Association, of which Hyderali Dharamshi, Ltd. are the managing agent. The deceased, who was his brother-in-law, was a director of that company.

On January 20, 1963, he visited the deceased in the Nile Nursing Home, Kampala. The deceased told him that a premium was due on a policy. The witness passed the news on to Mr. Hussein Walji, who is also a director of the company and the deceased’s brother-in-law. As they did not know the amount of the premium Mr. Walji gave him the company’s blank signed cheque (Exhibit B). Back at Mukoko Mr. Dhamani found the policy and filled in Shs. 1,275/-, the amount of the premium, on the cheque which he dated January 21. He wrote an accompanying letter (Exhibit C) to the defendants, posting both documents at the Bukulula Post Office, near Mukoko, under certificate of postage (Exhibit D) which he wrote out himself.

In cross-examination Mr. Dhamani stated that he and the deceased had lived at Mukoko for three to four years. They were family friends. He knows Mr. Balashanker Kalidas Gore, the defendants’ Masaka manager, who used to visit the deceased. On February 1 he saw him at the deceased’s funeral at Nabusanke, but he merely expressed his condolences and did not inquire if the premium had been paid. The witness did not say that they were busy and had forgotten it. The deceased had a personal bank account. Mr. Walji gave evidence that Mr. Bhagwanji Ganatra, the company’s accountant, filled in the counterfoil of the cheque (Exhibit E), dated January 21, when Mr. Dhamani told him the amount two to three days later. Although he only uses one cheque book at a time, the previous and subsequent counterfoil entries are dated January 21 and April 4 respectively, which does suggest that the company’s business was slack. Previous to that the entries are much more regular Mr. Ganatra confirmed Mr. Walji’s evidence.

Mr. Desiderio Kagwa, a petrol seller for Jan Mohamed, also runs the postal agency. He signed Exhibit D. He changes the date stamp by hand, every day. On Exhibit D it is only possible to decipher ‘Jan’ but he denies that Mr. Dhamani brought him Exhibit D to sign on February 1 or 2.

Mr. Jan Mohamed gave evidence that it takes letters two to three days to reach Kampala.

That was the plaintiffs’ case.

Mr. Sardoon Singh, the defendants’ Uganda manager, says that he received a ‘phone call from Mr. Gore on January 31 that the deceased had died. He asked Mr. Gian Chand Sharma, the office superintendent, to check the position regarding the policy.

On February 4 he opened Exhibit C containing Exhibit B. Exhibit C was date stamped in his presence and impressed with the number “001524” which is the serial number of letters coming in. Then Exhibits B and C were entered in the accounts inward letter register (Exhibit G). Exhibit H is the envelope, but the stamp and post mark have been removed. Mr. Singh cannot say how this happened. Exhibit H was sent to Nairobi and then to Head Office in Bombay. The defendants issued a deposit receipt (Exhibit F) as Exhibit B was received after the risk date. Mr. Singh admitted that the defendants usually accepted cheques in payment of premiums and that their only complaint was that they did not receive Exhibit B by January 28.

Mrs. Amin, who kept the register (Exhibit G) gave evidence that she entered Exhibits B and C on February 4, on the day of receipt, under the serial number “1524” in the normal course of business. Mr. Sharma confirmed her evidence. He also dated Exhibit C “4/2” in red ink. Finally on this part of the case, Paulo Mugenyi collects the mail from the Post Office and hands it to Mr. Singh.

Mr. Gore gave evidence that he canvassed the deceased’s policy at the end of 1961. He met Mr. Dhamani at the funeral. After expressing his condolences he commented on the deceased’s foresight in providing for his survivors as he was insured with the defendants, whereupon Mr. Dhamani told him that they had been very worried by the deceased’s illness, and through oversight a premium wasn’t paid.

On February 2, as a result of a phone call, he went to Mr. Sadrudin Jiwa’s shop where, in the presence of the deceased’s brothers, Mr. Jiwa offered him the premium. Mr. Gore had to decline it as it was too late. Mr. Jiwa asked if the money could be paid through National and Grindlays Bank, the collecting agent, but Mr. Gore’s reply was again discouraging. Mr. Gore would, of course, know if the bank had such authority.

I ignore Mr. Gore’s evidence that three months after the funeral Mr. Dhamani informed him that he had paid the premium with a cheque from Kampala, posted from Mukoko, following Mr. Gore’s reproach that he had previously said that it had not been paid due to an oversight, as this was not put to Mr. Dhamani in cross-examination.

Mr. Vittelbhai Patel gave evidence that he overheard the conversation between Mr. Gore and Mr. Dhamani at the funeral, about the non-payment of the premium. He appeared to be a non-partisan witness.

Mr. Duffus, the Manager of National and Grindlays Bank at Masaka, recalled a visit by Mr. Jiwa and Mr. Abdul Jan Mohamed after the deceased’s death, he thought, at which he denied receiving instructions to pay the premium through the bank as collecting agent.

Mr. Jiwa stated that Mr. Gore told him, after the deceased’s death, that the bank had made a mistake in not paying the premium. This is some confirmation of the interview with Mr. Gore, although not as to exactly what was said.

Mr. Abdul Jan Mohamed agreed that he had inquired of Mr. Duffus, after the deceased’s death, if the bank had paid the premiums on the insurance, and that the answer had been “no”. These two gentlemen were apparently interested in the deceased’s affairs as fellow members of the Ismaili Community. They could not be expected to be sympathetic to the defendants’ case but, as counsel for the defendants puts it, their evidence may contain important “half-truths”.

My first impression in reviewing the evidence, which is in acute conflict, is that Mr. Gore’s consolatory remark at the funeral has a ring of truth about it and that following his admission Mr.

Dhamani engaged in a flurry of activity which included an attempt to pin responsibility for the payment of the premium on National and Grindlays Bank, and resulted in the antedated cheque and letter

(Exhibits B and C). Mr. Gore triggered off this activity. While I realize that business dealings in Asian circles are not always straightforward, why was it necessary for Mr. Dhamani to get a cheque, on a company of which the deceased was a director, in Kampala and post it from Mukoko with a certificate of postage unless it was to create evidence that steps had been taken to renew the premium before the deceased's death? If there was any urgency about the matter, Mr. Dhamani could have ascertained the amount of the premium from the defendants' Kampala Office. The deceased had his own bank account: I have no evidence as to whether he was too ill to inform Mr. Dhamani of the amount of the premium or to sign his name on a cheque form. I am quite satisfied that the defendants did not receive Exhibits B and C before February 4 as their records, kept with bureaucratic efficiency, reveal, plus the evidence of Mr. Sharma and Mrs. Amin, who favourably impressed me. I prefer this evidence to that of Mr. Kagwa, the petrol seller, who was excusably not so businesslike and who might have been under the influence of Mr. Dhamani. At the same time I must admit that I am somewhat disturbed by the disappearance of the stamp and postmark on the envelope. This may have been the work of a zealous philatelist between Nairobi and Bombay, or of someone trying to obliterate evidence apparently in favour of the plaintiffs' case. Despite this, my conclusion remains the same. On the issues of fact I find:

- (1) that the cheque was posted after the deceased's death;
- (2) that it was received on February 4; and
- (3) that the policy was not subsisting on January 31.

In view of these findings of fact, it is not necessary to say much about the legal issues, but in deference to counsels' submissions I will give my views on them shortly.

The general rule is that a debtor must seek out and pay his creditor; and an assured, if he chooses for his own convenience to send money, in any form, through the post, does so at his own risk. In *Pennington v. Crossley & Son* ((1897), 77 L.T. 43) the defendants were in the habit of purchasing goods from the plaintiff and for many years had sent him cheques by post, and the plaintiff had never objected to being paid in this way. It was held that there was nothing from which the Court would infer a request by the plaintiff to the defendants for payment by means of a cheque sent through the post, so as to make the loss of a cheque during transmission by the post fall upon him.

The policy (Exhibit A) is silent as to the mode of payment but I think it is clear, without extrinsic evidence as to custom or usage, from the evidence of Mr. Singh, the retention of Exhibit B by the defendants and the contents of Exhibit G, that payment of premiums by cheques through the post was sanctioned – there was more than mere passive acceptance of money paid in this way, as in *Pennington's* case (*supra*) – and that it would have been sufficient if the deceased or someone on his behalf had posted the cheque in time to reach the defendants in the ordinary course of post before the expiration of the time limited for payment, even although, owing to some accident, it was delayed in the post: see *Tankexpress A/S v. Compagnie Financière Belge des Petroles S.A.* ([1948] 2 All E.R. 939). This mode of payment is, of course, conditioned on the cheque being honoured. There is no evidence before me of delay in the post. The evidence is the other way.

I would answer the fourth issue by saying that it was the defendants' sanctioned usage, if not normal custom in a technical legal sense, to receive payment by cheque.

On the fifth issue there is no evidence that the defendants had made the post office their agent for acceptance of premiums so that the deceased's debt would

have been discharged by posting a letter containing the cheque duly addressed to the defendants.

For the above reasons the suit is dismissed with costs.

Order accordingly.

For the plaintiff:

RE Hunt

RE Hunt, Kampala

For the respondent:

G Singh

Singh & Treon, Kampala

Benbros Motors Tanganyika Ltd v Patel
[1968] 1 EA 247 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	14 November 1967
Case Number:	19/1967 (25/68)
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] *Jurisdiction – Retrospective effect of legislation – Security of Employment Act 1964, s. 28 (1) (T.) – Removing jurisdiction from civil court to board – Whether cause of action arising before Act came into operation can be entertained by the court.*

[2] *Legislation – Retrospective effect – Act transferring jurisdiction from civil court – Board substituted for court – Whether Act can operate retrospectively – Security of Employment Act 1964, s. 28 (1) (T.).*

[3] *Master and servant – Summary dismissal suit – Civil court jurisdiction transferred to board – Whether legislation retrospective – Security of Employment Act 1964, s. 28 (1) (T.).*

[4] *Master and servant – Suspension of employee – Whether included in suits for summary dismissal – Security of Employment Act 1964, s. 28 (1) (T.).*

Editor's Summary

The respondent brought an action in the civil court on November 2, 1965, on a cause of action arising out of his suspension from employment on July 27, 1964. Section 28 (1) of the Security of Employment Act came into effect on May 1, 1965, and provided that after that date no suits for summary dismissal should be entertained by any civil court but should be referred to a board to be constituted under that Act. The

time within which such reference could be made to the board was prescribed as seven days from the date of the cause of action. The lower court found that it had jurisdiction to entertain the suit notwithstanding the provisions of s. 28 and the present case was an appeal against that ruling. The respondent claimed that the proceedings did not fall within s. 28 as they were not proceedings based on a summary dismissal but on a suspension from work.

Held –

- (i) the matter before the court was clearly one of procedure and not one of substance; therefore the enactment applied to all actions whether commenced before or after the passing of the Act;
- (ii) the plaintiff claimed damages arising out of severance of the contract of employment and the court must therefore assume that there had been a termination of employment by the employer within the terms of s. 28 (1) of the Security of Employment Act;

(iii) the district court had therefore no jurisdiction to entertain the plaintiff's claim.

Appeal allowed with costs.

Cases referred to in judgment:

(1) *The Ydun*, [1899] P. 236.

(2) *Wright v. Hale* (1860), 6 H. & N. 227.

Judgment

Hamlyn J: A preliminary point has been raised by counsel for the appellant in this appeal, asking this court to rule that the trial court had no jurisdiction to hear the matter before it and that consequently the proceedings in the case were a nullity; this being the case (argues the appellant), there is nothing from which to appeal to this court.

The argument is based on the provisions of s. 28 (1) of the Security of Employment Act 1964, which reads:

“28(1) No suit or other civil proceedings (other than proceedings to enforce a decision of the Minister or the Board on a reference under this Part) shall be entertained in any civil court with regard to the summary dismissal, or a deduction by way of a disciplinary penalty from the wages of an employee.”

This contention was raised at the proceedings before the trial court, and the learned resident magistrate made a ruling thereon. During the course of such ruling, the court said:

“The cause of action arose on the 27.7.64 though the Act did not come into operation until 1.5.65. As the plaintiff does not fall within the category of persons to which art. 7 of the Indian Limitation Act 1908 applies, he had a period of three years to bring his claim, and in fact he filed it on the 2.11.65. Was he, in effect, barred from doing so once the bill became law on the 1.5.65? It is regrettable that the legislature has not seen fit to include any saving clause which would specifically make provision for a case like the present one and in the absence of one I consider that the Act cannot be retrospectively applied where the right of action accrued prior to the exclusion of the court's jurisdiction. Otherwise, it would mean that the plaintiff is denied any legal remedy, because even if the plaintiff (sic) were summarily dismissed as averred in the written statement of defence, he cannot now refer the dispute to the conciliation board under s. 23. I accordingly find that notwithstanding s. 28, this court has jurisdiction to entertain the suit.”

Learned counsel for the respondent, in reply to the appellant's contention, bases his argument mainly upon the allegation that the original proceedings do not fall within the prohibition contained in s. 28 (1) of the Act, in that they are not proceedings based upon summary dismissal of the plaintiff, but that the plaintiff complains of his “suspension” from work. I shall have something to say in regard to this point at a later stage in this judgment. Learned counsel further contended that s. 28 of the Act is substantive law and not merely procedural law, in that it must be read with s. 23 of the Act and that it should not be given retrospective effect unless the wording clearly shows that this should be done. To do so, argues counsel, would be to deprive his client of his remedy.

I think that to some extent both learned counsel are slightly confusing the issue in using the term “retrospective”, for the application of this term to the present circumstances can be only relative and not absolute. What has happened here

is this. In July, 1964, an event takes place which bases a cause of action of the plaintiff. There can be no argument that, if the plaintiff considered himself aggrieved, he could go immediately to the court and file his action, and the remedy would be available to him, if he substantiated his claim, to recompense him. The plaintiff however does nothing at that time. Some nine or ten months later the legislature sees fit to alter the existing law as to the procedure, in cases of the nature of the plaintiff's action. It deprives persons of this sort of having recourse to the civil courts and prescribes an alternative procedure, by which a board is substituted for the court. His time for reference of his claim to the board is (under s. 23 (2) of the Act) restricted to seven days from the date of his cause of action.

The plaintiff claims that, despite the alteration in the law, he is entitled, under the provisions of the Indian Limitation Act, to his three-year period in which to file his action. But the Security of Employment Act 1964, has specifically taken away the jurisdiction of the court in respect of his claim. And it is not until some six months after the Act came into force that he saw fit to file his papers in the court, which then had no jurisdiction to hear it – if I am persuaded that the action is one for “dismissal” and not one for mere “suspension from labour”.

I do not think that this court has any duty to put a strained construction upon the reading of a very clear section of the Act, in order “to find a way round” for the respondent to exercise a right which has been taken from him by the legislature. The matter is clearly one of procedure and not one of substance, in that the Act substitutes one tribunal for another in a particular class of cases. It does not affect an alternation in the law governing the relation of master and servant, but merely provides an alternative venue for the settlement of disputes.

Learned counsel for the appellant referred me to the case of *The Ydun* ([1899] P. 236). This was a case in negligence and concerned the application of the Public Authorities Protection Act 1893. In September, 1893, the plaintiff's barque “Ydun” sustained damage by grounding in the River Ribble within the port of Preston. In November, 1898, the plaintiffs commenced an Admiralty action against the defendants (the mayor, aldermen and burgesses of the borough of Preston), who relied upon the Public Authorities Protection Act of that year. In delivering judgment in the case, the court said:

“The rule applicable to cases of this sort is well stated by Wilde, B., in *Wright v. Hale* ((1860), 6 H. & N. 227), namely that when a new enactment deals with rights of action, unless it is so expressed in the act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the act.”

I find that s. 28 of the Security of Employment Act 1964, is a section of a procedural nature only and it thus applies to and covers the instant case.

Learned counsel for the respondent further argues that s. 28 of the Act is limited to cases of summary dismissal and that the plaint in the instant case is concerned only with his client's “suspension”. He instances para. 4 of the plaint in support of this contention. I think that this is taking a too narrow view of the matter and that the plaint must be read as a whole in order to ascertain the exact nature of the claim.

So far as I am aware suspension of the services of an employee can be made under statutory powers or under the terms of a contract of service. It is not an inherent right residing in the employer. It also presupposes a suspension pending some other event usually an investigation into some act on the part of the

employee, and according to the outcome of such investigation the employee is either dismissed or otherwise punished, or else is reinstated.

The plaint contains no hint of such claim here, either for investigation or for reinstatement: on the contrary, the plaintiff in his prayer seeks to recover a sum of Shs. 1,500/- as “severance allowance”. One naturally enquires “severance from what?” If the plaintiff maintains that he has been suspended, then surely that is the very antithesis of any “severance” from his duties. Suspension is merely a temporary cessation from work, pending an investigation into matters in dispute or at least as yet unascertained. “Severance”, so far as I am aware, in this sense, is a complete and permanent cessation from employment and s. 3 of the Severance Allowance Act 1962 sets out the circumstances in which such severance arises – termination of employment by employer, expiry of contract, death of employee – these are the factors which give rise to “severance”.

As the plaintiff is claiming damages arising out of such severance, I can only assume that there has been a severance – a permanent cessation of the character of employer and employee between the parties – in other words a termination by the employer. And this brings the argument in full circle and leads me to the conclusion that such termination of service by the employer is exactly that circumstance to which s. 28 of the Security of Employment Act refers.

I consequently find that the district court had no jurisdiction to entertain the plaintiff’s claim in the first instance in view of the provisions of s. 28 of the Security of Employment Act 1964, and that the plaint should have been returned by the court to the plaintiff under the provisions of O. 7 of the Civil Procedure Code 1966. As a consequence this appeal must be and is hereby allowed; the appellant will have his costs in this court and in the court below.

Appeal allowed.

For the appellant:

AA Lakha

Fraser Murray, Roden & Co, Dar-es-Salaam

For the respondent:

NP Patel

Natubhai Patel, Desai & Co, Dar-es-Salaam

Tancot House Ltd v Tanganyika Tegry Plastics Ltd
[1968] 1 EA 251 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam

Date of judgment: 29 September 1967

Case Number: 11/1967 (32/68)

Before: Saidi J

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[1] Landlord and Tenant – Sub-lease for three years – Sub-tenant remaining in possession without consent of the landlord – Whether such possession should found a statutory tenancy – Rent Restriction Act 1962, s. 26 (3) (T.).

[2] Rent Restriction – Sub-lease – Sub-tenant remaining in possession without the consent of the landlord – Whether such possession can found statutory tenancy – Rent Restriction Act 1962, s. 26 (3) (T.).

[3] Rent Restriction – Application for vacant possession under s. 19 (1) (j) (ii) – Whether order for vacant possession unreasonable – Rent Restriction Act 1962 (T.).

Editor's Summary

The appellants were the landlords of a flat in Tancot House in Dar-es-Salaam which they had let to a Dr. Lovell on November 1, 1961, for a period of five years at a rent of Shs. 720/- per month. On August 15, 1963, Dr. Lovell was intending to leave Dar-es-Salaam and, with the consent of the appellants, he sub-let the flat to the respondents for a period of two years commencing on June 1, 1963, with an option to renew the sub-lease for one year. It was not made clear at that time whether Dr. Lovell was to return to Dar-es-Salaam or not. Dr. Lovell's original lease was to expire on October 31, 1966. On February 23, 1966, the appellants wrote to Dr. Lovell's counsel reminding them that the lease was due to expire on October 31, 1966, and requesting possession of the flat from that date for an employee of the appellant firm. Counsel for Dr. Lovell informed the appellants that Dr. Lovell had left the country for good but that they had been instructed to defend the interests of the respondents as sub-tenants and that as the respondents had acquired a right to occupy the flat as statutory tenants, they wished to remain in occupation for a further three years and would be prepared to execute a lease for that period. The appellants refused to recognise the statutory tenancy and claimed that the sub-lease had come to an end on June 30, 1966. The respondents were given seven days within which to vacate the premises and, on their failing to comply, the appellants applied to the Rent Restriction Board for an order for vacant possession on two grounds; (a) that the respondents were in wrongful occupation of the flat and (b) that, alternatively, the appellants required the flat for occupation by their full-time employee under s. 19 (1) (j) (ii) of the Rent Restriction Act 1962. The Board dismissed the application on the grounds that (a) the respondents had become statutory tenants after the expiration of the option period on June 30, 1966, and were protected by s. 26 (3) of the Rent Restriction Act 1962 and (b) it was, in the circumstances, unreasonable to grant vacant possession of the flat to the appellants. The appellants appealed against this decision.

Held –

- (i) the sub-tenancy given to the respondents expired on June 30, 1966, and from the correspondence between the appellants and the respondents in April, 1966, it was clear that the appellants were not prepared to renew the lease;
- (ii) the sub-lease under which the respondents remained in occupation after July 1, 1966, had no consent of the appellants and the respondents had therefore no lawful possession as required by s. 26 (3) of the Rent Restriction Act 1963;
- (iii) the appellants' application for vacant possession was not brought unreasonably and therefore an order for vacant possession should automatically follow;

- (iv) it would not be reasonable to ask the respondents to vacate forthwith and the order for vacant possession would therefore be suspended for nine months from the date of judgment.

Appeal allowed with costs.

Cases referred to in judgment:

- (1) *Chaganlal & Co. v. Demetrios H. A. Joglou and Another*, Misc. Civil Appeal No. 5 of 1966 (unreported).
- (2) *Syed Abdulla Alawi Al-Jifri v. Bint Abdulla Al-Safi and Another*, [1965] E.A. 800.
- (3) *Gidden v. Mills*, [1925] 2 K.B. 713.
- (4) *Beresford's Trustees v. McInnes*, 1926 S.L.T. 78.
- (5) *Bournemouth and Boscombe Athletic Football Club v. Stephens* (1951), 102 L.J. News. 52.

Judgment

Saidi J: This is an appeal against the decision of the Rent Restriction Board of Dar-es-Salaam in an application for recovery of possession of Flat No. 5 in Tancot House, City Drive, Dar-es-Salaam.

The history of this case is long, and somewhat complicated. Originally the flat was let by Tancot House Ltd. (the appellants) to Dr. A. A. Lovell on November 1, 1961, for a period of five years at a monthly rent of Shs. 720/-. With the consent of the appellants Dr. Lovell sub-let the flat to Tanganyika Tegry Plastics Ltd. (the respondents) on August 15, 1963, for a period of two years commencing from June 1, 1963, with an option of renewal for one year at the expiration of the period of two years. It was agreed that the sub-tenants would continue to pay the same rent to the appellants on behalf of Dr. Lovell. This agreement took place because Dr. Lovell was leaving Dar-es-Salaam but it was not made clear whether he was going for good or he would return to Dar-es-Salaam. From the facts on the record it appears that the sub-tenants exercised the option to renew the sub-lease for one year, which ended on June 30, 1966. The original lease was to come to an end on October 31, 1966.

On February 23, 1966, the appellants wrote to Messrs. D. Childs-Clarke and Company, counsel for Dr. Lovell, reminding them that the lease granted to Dr. Lovell was to expire on October 31, 1966, and stating that they would require possession of the flat for the use of an employee. On June 2, 1966, Messrs. Childs-Clarke replied to say that Dr. Lovell had left the country for good, but mentioned Dr. Helliwell, who had taken over the business of Dr. Lovell, as the person who was interested in the matter. Other correspondence was exchanged between the appellants and their counsel, Messrs. Donaldson and Wood, on the one hand, and Messrs. D. Childs-Clarke and Company on the other hand. On June 13, the appellants wrote to Messrs. D. Childs-Clarke and Company stating that they considered them to be still acting for Dr. Lovell, the original tenant, and that they would continue to hold them responsible for the payment of rent for the flat in compliance with the conditions of the lease. There is a reply from Messrs. D. Childs-Clarke and Company dated June 29, 1966, stating that as Dr. Lovell had left the country for good they were no longer acting for him but that they had been instructed by the respondents, as the sub-tenants, to defend their interest in the lease. They wrote again on July 20 to say that the respondents, who had been in occupation of the flat for two years, paying the rent regularly, wished to continue in occupation for another three years as they had acquired the right to do so as statutory tenants and would,

if required, execute a lease for the said term of three years. To this Messrs. Donaldson and Wood replied on September 13, 1966, asserting that the appellants would not recognise the

respondents as statutory tenants since the sub-lease with Dr. Lovell came to an end on June 30, 1966, and stating that they were instructed to serve notice on the respondents to quit within seven days, failing which they would lodge an application with the Rent Restriction Board for an order for vacant possession. As the respondents did not comply with the notice to quit and deliver up possession the appellants filed an application in the Rent Restriction Board of Dar-es-Salaam praying for an order for vacant possession on two grounds:

- (a) that the respondents were in wrongful occupation of the flat as they were not entitled to hold the flat against the appellants, and
- (b) that, alternatively, the appellants required the flat for the occupation of their full-time employee under s. 19 (1) (j) (ii) of the Rent Restriction Act 1962.

After a full hearing the Rent Restriction Board dismissed the application, holding:

- (a) that the respondents had become statutory tenants of the appellants after the expiration of the option period, that is from July 1, 1966, and were as such protected by s. 26 (3) of the Rent Restriction Act 1962, and
- (b) that it was, in the circumstances, unreasonable to grant possession of the flat to the appellants under s. 19 (1) (j) (ii).

From this decision the appellants are appealing to this court. The appeal was very strongly contested by counsel for the appellants and counsel for the respondents. Counsel for the appellants submitted that before the respondents could effectively seek protection under s. 26 (3) of the Rent Restriction Act 1962 they had to establish two conditions: firstly that they had in their favour a sub-tenancy subsisting immediately before the termination of the original lease; and secondly that such sub-lease was lawful at the material time. According to him the sub-lease terminated on June 30, 1966, whereas the original lease terminated on October 31, 1966. He contended that as between July 1, 1966, and October 31, 1966, there was no sub-tenancy either between Dr. Lovell and the respondents or between the appellants and the respondents subsisting. Therefore, he said, the protection of s. 26 (3) of the Rent Restriction Act could not be invoked in favour of the respondents as there was no sub-lease in existence when the original lease terminated, and that being the position the respondents were in unlawful occupation of the flat on October 31, 1966. Counsel for the respondents' contention, on the other hand, is that a statutory tenancy in favour of the respondents had come into existence on July 1, 1966, i.e. immediately on the expiration of the sub-lease, by reason of the acceptance by the appellants of the regular monthly rent at the same rate, an act which, according to him, constituted waiver of the termination of the sub-lease. In the alternative counsel for the respondents contends that the appellants are estopped from denying that the respondents are and had been their tenants or statutory tenants by the fact that they had accepted the payment of rent by them for a period extending to three years, i.e. from June 1, 1963 to June 30, 1966, while knowing full well that Dr. Lovell, the original tenant, had left Dar-es-Salaam for good. He maintains that it was well understood at the time of his departure from Dar-es-Salaam that Dr. Lovell would not come back. That, he said, was the reason why the appellants were willing to give their consent to the sub-lease and option for renewal.

In my view the contention of counsel for the appellants appears to be correct. I say so for two reasons: first, on the facts of the case the sub-tenancy given to the respondents expired on June 30, 1966, and the appellants were not prepared to renew it, as can be seen from the correspondence exchanged with counsel for the respondents. On April 23, 1966, that is before the sub-tenancy expired, the appellants informed counsel for the respondents that they would require

possession of the flat on October 31, 1966, when the original lease between them and Dr. Lovell came to an end. This information they passed on to counsel for the respondents who were known to act, and had been acting, for Dr. Lovell, for the purpose of passing it to Dr. Lovell himself. It was not then known that Dr. Lovell had left Dar-es-Salaam for good. The contention of counsel for the respondents that it was known or understood at the time of executing the sublease that Dr. Lovell was leaving Dar-es-Salaam for good is not supported by the evidence. It was in the letter of June 2, 1966, written by counsel for the respondents, that the news that Dr. Lovell was not returning to Dar-es-Salaam reached the appellants. Again, in the letter of July 20, 1966, written by counsel for the respondents it was clearly stated that they were no longer acting for Dr. Lovell and were now acting for the respondents. In this letter counsel for the respondents for the first time asserted that the respondents had become statutory tenants of the appellants and wished to continue to occupy the flat for another three years and would if required execute a lease for such a period. Counsel for the appellants, by their letter dated September 13, 1966, stated in clear terms that the appellants were in no way prepared to accept the respondents as their tenants and had not at any time before recognised them as such. They further said in that letter that the sub-lease granted to the respondents had expired on June 30, 1966, and that when the original lease granted to Dr. Lovell expired on October 31, 1966, they would require possession of the flat. In this same letter the appellants served notice on the respondents to quit the flat within seven days, failing which an application for an order for vacant possession would be lodged with the Rent Restriction Board. It appears to me that the appellants were not prepared to extend the sub-lease granted to the respondents beyond its term, and even before June 30, 1966, they had started communicating with their counsel informing them that there would be no extension of the sub-lease. The appellants maintained the same position after the expiration of the sub-lease, declining to recognise the respondents as their tenants, and on September 13, 1966, more than a month before the original lease expired, they served the respondents with notice to quit and deliver up possession of the flat to them.

My second reason is that whatever sub-lease the respondents may allege to have had in their favour after July 1, 1966, such sub-lease was one that had no consent of the appellants. This sub-lease, if any, had no consent of Dr. Lovell either, because it was clearly stated by counsel for the respondents in their letter of June 2, 1966, that Dr. Lovell was not returning to Dar-es-Salaam. Even if he had given consent for a continuation of the sub-lease beyond June 30, 1966, that consent would not have been valid because the flat was no longer occupied on his behalf, he himself having left Dar-es-Salaam without an intention of returning to the flat. I would thus hold, as my brother Mustafa, J., held in *Chaganlal & Co. v. Demetrios H. A. Joglou and Another* (Misc. Civil Appeal No. 5 of 1966 (unreported)) that Dr. Lovell having left the flat for about three years without any intention of coming back before his lease with the appellants expired, had abandoned the lease, and whoever was holding it on his behalf would not have lawful possession of it beyond the period of the lease. Accordingly grounds 1 and 2 of the appeal must succeed. It is clear from the facts of the case that the respondents had not, as they sought to establish, become statutory tenants of the appellants after the expiration of the option period and could not, therefore, be protected by s. 26 (3) of the Rent Restriction Act 1962.

It now remains to consider grounds 3 and 4 of the appeal, which deal with the question whether or not it is reasonable to make an order for vacant possession in favour of the appellants. In the application before the Rent Restriction Board the appellants had stated in the alternative that they required the flat for the occupation of their full-time employee, namely their secretary, under s. 19 (1) (j) (ii) of the Rent Restriction Act. It would appear that the respondents

having been found to be in unlawful occupation of the flat in the relevant period, that is at the time the original lease had expired, and the landlords having sought to obtain possession of the flat for the use of their employee, then an order for vacant possession would automatically follow, but this may not necessarily be so.

Counsel for the appellants made several complaints against the decision of the Board in connexion with the question of vacant possession. His main complaint was that the decision of the Board on this issue was one-sided and was based largely on irrelevant matters. He also complained that the Board had not properly considered the evidence of the appellants on this issue. He contended that the facts of the case clearly showed that the flat had not been continuously occupied and used by the respondents. The evidence of Peter Frederick Lewis, the secretary of the Tanganyika Cotton Co. Ltd., shows that when Dr. Lovell left Dar-es-Salaam in the middle of 1963 the manager of the respondent company occupied the flat with his family for about a year. From the middle of 1964 until the end of 1965 an architect of the Kilimanjaro Hotel occupied the flat. Thereafter an accountant and an engineer employed by the Kilimanjaro Hotel occupied the flat at different times. From the beginning of 1966 the flat was occupied by employees of the respondents. The witness said that he had visited the flat frequently and had found it tidy and well kept all the time until the middle of 1965. Thereafter the flat no longer looked tidy and clean; an air-conditioner was taken out, the rooms looked dusty, the luggage was packed and piled up, and for some period it appeared it had been abandoned. Counsel for the appellants said that this was the condition of the flat at the time the application for vacant possession was lodged with the Rent Restriction Board. According to him there was no clear evidence to establish that the flat had been continuously occupied by the respondents themselves or by their own employees. It was not clearly shown how the architect and the engineer attached to the Kilimanjaro Hotel came to occupy the flat and whether they had anything to do with the respondents. In connection with this submission he relies on the decision in *Syed Abdulla Alawi Al-Jifri v. Bint Abdulla Al-Safi and Another* where Crabbe, J.A., made the following observation ([1965] E.A. at p. 808):

“... In my view the actual use to which the premises is being put at the time when possession is sought by the landlord is the criterion for determining whether or not the tenant is protected: see *Gidden v. Mills* ([1925] 2 K.B. at pp. 722, 727). In this case there was not a shred of evidence that the first defendant was, at the date when possession was sought, using the ground-floor substantially for his tobacco business, or for any other business. It is the de facto use of the premises that gives the statutory tenant the status of irremovability and not his hope for future use.”

In reply counsel for the respondents submitted that the decision of the Board refusing to grant vacant possession to the appellants was a sound one. He contended that this decision was based on two major grounds:

- (a) that the secretary of the appellants was not a full-time employee of the appellants because he worked for two companies, Tancot House Ltd. and the Tanganyika Cotton Co. Ltd.;
- (b) that it was unreasonable to make an order for vacant possession against the respondents, bearing in mind the circumstances of the case, and in particular the following factors:
 - (i) the appellants had plenty of accommodation as they have four houses and three blocks of flats built for the purpose of letting to the public in Dar-es-Salaam;
 - (ii) the secretary of the appellants was already housed and was not as such in need of accommodation, while the respondents could not easily secure alternative accommodation;

(iii) the respondents had spent the sum of Shs. 4,000/- for improvements and renovation in the flat.

With regard to the first contention, it is not disputed that Mr. Lewis is an employee of two companies, namely Tancot House Ltd. and the Tanganyika Cotton Co. Ltd. Counsel for the respondents therefore contends that Mr. Lewis was not as such a full-time employee of the appellants because he did not work for them alone. When asked by the court as to how it came about that Mr. Lewis was serving two different companies, counsel for the appellants gave the following explanation. He told the court that the Tanganyika Cotton Co. Ltd. is the managing agent of Tancot House Ltd., that both companies share the same staff and office. So far there is nothing in the evidence to show what the relation between these two companies is. There are two witnesses on the side of the appellants in this case, Claude Robertson and Peter Frederick Lewis. Mr. Robertson told the Board that he was a director of Tancot House Ltd. and also a director of the Tanganyika Cotton Co. Ltd. He said that there were three directors and one secretary, that the Tanganyika Cotton Co. Ltd. were managing agents of Tancot House Ltd., and that the secretary of the Tanganyika Cotton Co. Ltd. is also the secretary of Tancot House Ltd. He further said that the appellants wanted vacant possession of this flat so that the secretary of Tancot House Ltd. and the Tanganyika Cotton Co. Ltd., who is responsible for the day-to-day management of the work of both companies, would be able to reside there. Mr. Peter Frederick Lewis had told the Rent Restriction Board that he was the Secretary of the Tanganyika Cotton Co. Ltd. He further said that the Tanganyika Cotton Co. Ltd. is the managing agent of Tancot House Ltd. and that he, as secretary of both, manages the day to day affairs of Tancot House Ltd., such as the collection of rent paid by the tenants and the issuing of receipts.

On this question of “full-time employee” counsel for the respondents referred to Megarry’s Rent Acts (7th Edn.), p. 254, para. (a). This deals with the topic “Engaged in full-time employment”. There the learned writer says:

“The first alternative is that the person is ‘engaged in (the landlord’s) whole-time employment or in the whole-time employment of some tenant from him’ . . .

. . . The governing director of a company may be engaged in the company’s whole-time employment . . .

Working half-time owing to slackness of work may also satisfy the requirement of ‘whole-time employment’ . . . Further, there must be complete identity between the employer and the landlord, so that a landlord cannot claim possession under this head for a person employed by the landlord and two other persons either jointly or severally.”

In the present case it is admitted that Mr. Lewis is employed by both the Tanganyika Cotton Co. Ltd. and Tancot House Ltd. as a secretary. The evidence does not show which company actually pays him, or, if he is paid by both, how much each of them pays him. The question to be decided is whether or not the manner in which Mr. Lewis is employed by the appellants satisfies the condition of “full-time” employee. According to Megarry even half-time employment could in certain cases satisfy this requirement of “whole-time employment”; *Beresford’s Trustees v. McInnes* (1926 S.L.T. 78). Even professional footballers have been held to be whole-time employees of their club despite the shortness of their hours of work; *Bournemouth and Boscombe Athletic Football Club v. Stephens* ((1951), 102 L.J. News. 52).

The next contention of counsel for the respondents was that it was unreasonable to make an order for vacant possession against the respondents in the circumstances of the case. According to him the decision of the Rent Restriction Board

was largely based on this issue. He again referred the Court to Megarry's Rent Acts, p. 233, s. 2, which deals with the topic "Reasonableness of Order". There the learned author said the following:

"No order for possession may be made 'unless the court considers it reasonable' to do so. This is an overriding requirement, so that even if one or more of the grounds for possession set out below exist, no order for possession can be made unless the court, exercising its discretion 'in a judicial manner, having regard on the one hand to the general scheme and purpose of the Act, and on the other to the special conditions, including to a large extent matters of a domestic and social character,' thinks it reasonable to do so.

"The duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing . . .'. The court must consider not whether the landlord's desire for possession is reasonable, but whether it is reasonable to make an order for possession, for 'because a wish is reasonable, it does not follow that it is reasonable in a court to gratify it'."

In this connection counsel for the respondents submitted that it would be unreasonable to make an order for vacant possession against the respondents because, in the first place, they had recently spent the sum of Shs. 4,000/- for improvements renovations in the flat; in the second place the secretary of the appellants was already housed and was not as such in need of accommodation, while the respondents could not easily secure alternative accommodation in Dar-es-Salaam; and in the third place the appellants had plenty of accommodation in their other four houses and three blocks of flats in Dar-es-Salaam to which they could resort to if they were in real need of accommodation.

It had been the contention of counsel for the appellants that the appellants had sought vacant possession of this particular flat not with the purpose of victimising the respondents, but they had done so on two grounds: firstly, the lease entered into with regard to this flat had expired and the respondents were duly warned before the term came to an end that the lease would not be renewed; and secondly, the appellants required vacant possession of this flat for the use and occupation of their own secretary. It was contended by counsel for the appellants that the intention of the appellants in bringing their secretary to the flat was to make his work simpler and more effective. In my view the appellants are entitled to re-arrange their affairs in any way they like in order to obtain the maximum benefit from the services of their secretary. On the material now before this court the flat had not been continuously occupied by the respondents and at the time of the filing of the application before the Rent Restriction Board for vacant possession it had been left in a condition that seemed to indicate that it had been vacated or was in the process of being vacated. There is evidence showing that persons not in the employment of the respondents had from time to time occupied this flat. This would go to show that the respondents do not, as seriously as alleged, require possession of the flat. Accordingly grounds 3 and 4 of the appeal must succeed also.

For these reasons I would allow the appeal, set aside the decision of the Rent Restriction Board and make an order for possession of the flat against the respondents. As the respondents have been in occupation for a fairly long time it would not be reasonable to ask them to vacate forthwith. I will in the circumstances suspend the order for possession for nine months from the date of this judgment. The appellant will have the costs of this appeal.

Order accordingly.

For the appellant:

I Peera

Donaldson & Wood, Dar-es-Salaam

For the respondent:

RP Chatwani

RP Chatwani, Dar-es-Salaam

**Masaka District Growers Cooperative Union v Mumpiwakoma Growers
Co-Operative Society Ltd and four others**
[1968] 1 EA 258 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 1 March 1968
Case Number: 42/1966 (33/68)
Before: Sheridan J
Sourced by: LawAfrica

[1] Arbitration – Prohibition – Application to prohibit arbitrator from continuing in dispute – Attempt to stop arbitrator from considering matters other than those specifically sent to him – Grounds on which prohibition will be granted – Co-operative Societies Act (Cap. 93), s. 68 (U.).

[2] Prohibition – To prevent arbitrator from continuing in dispute – To stop arbitrator from considering matters other than those specifically sent to him – Grounds on which prohibition will be granted.

Editor's Summary

The applicants were a co-operative union engaged in processing coffee for its members the respondents. On January 16, 1965, the Registrar of Co-operative Societies, in pursuance of the powers conferred on him by s. 68 of the Co-operative Societies Act wrote to one Mr. Mitala appointing him as arbitrator in the dispute between the union and the respondent societies. The applicant union complained that there had been no proper reference of the dispute under the Co-operative Societies Rules in that the letter of reference did not set out full particulars of the dispute or fix a time within which the award should be forwarded by the arbitrator. The first hearing before the arbitrator was on April 9, 1965, and the second hearing on January 25 and 26, 1966, at which counsel for the applicant again protested that there was no order of reference nor sufficient particulars and was reluctant to produce the books of account on behalf of the union. On the fourth hearing on September 13 and 15, 1966, counsel for the applicant objected to an order for the production of the applicant's books, and applied for an order of prohibition.

Held –

- (i) the correspondence between the parties in which counsel for the applicant actively participated sufficiently defined the dispute and gave the necessary particulars;
- (ii) prohibition lies only for excess or absence of jurisdiction. It does not lie to correct the practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings;
- (iii) it is a discretionary remedy and the court may decline to interpose, by reason of the conduct of the

party or if there is a doubt in fact or law whether the inferior tribunal was acting without jurisdiction; and there was such a doubt in this case.

- (v) the order of reference should have limited the time within which the award was to be forwarded by the arbitrator; but the applicant's remedy was to appeal.

Application dismissed with costs.

Cases referred to in judgment:

- (1) *Farquharson v. Morgan*, [1894] 1 Q.B. 552.
- (2) *Mouflet v. Washburn* (1886), 54 L.T. 16.
- (3) *Jones v. James* (1850), 1 L.M. & P. 65.
- (4) *Barker v. Palmer* (1881), 8 Q.B.D. 9.

Judgment

Sheridan J: This is an application by notice of motion dated October 8, 1966, under r. 5 (1) of the Law Reform (Miscellaneous Provisions) (Rules of Court) Rules 1964, for an order of prohibition addressed to Mr. V. T. Mitala, arbitrator, to stop continuing as arbitrator in the alleged dispute between the four respondent growers' co-operative societies and the applicant union or, alternatively, to stop him from considering matters other than those specifically named by the Registrar of Co-operative Societies in his letter to Mr. Mitala dated February 15, 1965 (annexure B.2 to the statement accompanying the application under r. 6 of the Rules).

Since June 14, 1967, these prerogative orders are made under s. 34 of the Judicature Act (Act 11 of 1967) which, by Sch. 4 made under s. 48, repealed ss. 18 and 19 of the Law Reform (Miscellaneous Provisions) Act (Cap. 74).

The applicants are a co-operative union engaged in processing coffee for its members, the respondents.

There has been considerable correspondence between the parties, their advocates, the Registrar and Mr. Mitala. Copies of the letters have been annexed to the statement in support of the application and affidavits of Mr. Mboijana, for the respondents, and Mr. Mitala in reply. The reasons for the dispute and the objections to the arbitration proceedings emerge from a consideration of them.

On January 16, 1965 (annexure A) the Registrar, in pursuance of the powers conferred on him by s. 68 of the Co-operative Societies Act (Cap. 93), wrote to Mr. Mitala, appointing him as arbitrator in the dispute between the union and the societies which had been expelled and others which had complaints with the Union. He was urged not to delay and to inform the Registrar of his findings in due course.

It appears that the dispute had been referred to the Registrar and, under s. 68 (3) (b), he referred it for disposal to an arbitrator.

Counsel for the applicants complained that there had been no proper order of reference as is required by r. 42 (2) of the Co-operative Societies Rules, in that the letter (Exhibit B2) did not (a) set out the dispute and full particulars thereof and (b) limit the time within which the award should be forwarded by the arbitrator. Exhibit B2 is in the following terms:

“Further to my letter No. 389/X.II dated January 16, 1965, I quote here-below the summary of the dispute put forward by the expelled and suspended societies through their lawyers, Messrs. Mayanja, Clerk and Company in their letter of January 12, 1965.

- ‘1. Our clients allege that the affairs of the union are being or have been mismanaged, and particularly that the amount of coffee sold to the Coffee Marketing Board in the 1962/63 season was greater than the amount shown in the union’s balance sheet for that year. Our clients further challenge the balance sheet for that season on several other important items on which they are ready and willing to give evidence.
2. Our clients complain that when, in accordance with the union’s bye-laws, they drew attention to the matters stated in 1. above, the union reported by expelling Mumpiwakoma and suspending seven other primary societies. The expulsion and suspension, it is contended, were harsh and illegal in that they were contrary to the rules of natural justice.’

This is the list of the societies which were expelled/suspended, as given to me by their advocates.

1. Mumpiwakoma G.C.S. Ltd. (this was expelled)
2. Kitiibwa Kya Buganda G.C.S. Ltd., suspended
3. Anaseera Ababe G.C.S. Ltd., suspended

4. Kabwangu G.C.S. Ltd., suspended
5. Kyamusoke G.C.S. Ltd., suspended
6. Mubwesoka G.C.S. Ltd., suspended
7. Ssanya Bugaga Manyi G.C.S. Ltd. suspended
8. Kyoyagaliza Mbazzi G.C.S. Ltd. suspended.

(sgd.) P. Kwebiha

registrar of co-operative societies”

By his letter dated March 11, 1965 (annexure C) addressed to Mr. Mitala, counsel for the applicants, while maintaining that there had been no order of reference, asked for particulars of the dispute.

These are set out in Mr. Mboijana’s letter to Mr. Mitala dated April 6, 1965, copy to counsel for the applicants (annexure H) the relevant part of which reads:

“ . . The following are some of the specific issues which will be raised at the hearing:

- (i) That the disbursement of Shs. 313,988/38 by the union by way of wages and allowances required full explanation by the union management, and the societies were entitled to query this expenditure and ask for full particulars and the powers under which the union management acted in incurring such an expenditure.
- (ii) That the societies were entitled to know and would like to know the proceeds realised from the triage taking into account the coffee tonnage produced during the period in question.
- (iii) That the societies were entitled to know and would like to know how and on what consideration did the union management organise the transportation of the union’s coffee from Masaka to the Coffee Marketing Board. And further they would like to know how was the transport proceeds paid by the Coffee Marketing Board disbursed by the union management. The societies complained and will contend at the hearing that the union management showed favouritism and deviated from the past practice thus causing loss to both the union and component societies.
- (iv) The societies were entitled to dispute and disagree with the misleading statements contained in the chairman’s report for the period from March, 1963, and March, 1964, particularly in regard to grading and prices of the union’s coffee. And the union management was wrong in rejecting the societies’ contentions which were supported by figures from the Coffee Marketing Board.
- (v) The union was and is entitled to know why there was a difference in tonnage of coffee between the figures given in the balance sheet and the figures of Coffee Marketing Board of approximately 265 tons.

The above are some of the issues which the societies intend to raise at the hearing. These issues have been the subject matter of dispute between the union, officials and the respective societies. The union’s advocate should or ought to have been sufficiently briefed on them. They cover items (a), (b) and (c) in para. 4 of your letter.

All the accounts touching the matters in dispute are in the custody of the union, the societies would like to have these accounts produced at the hearing particularly a detailed account touching the statements contained in (i), (ii) and (iii) above.”

On April 9, 1965, Mr. Mitala sat for the first time but I am informed that the proceedings were confined to a discussion about the procedure to be adopted.

The next hearing did not take place until January 25 and 26, 1966. Meanwhile there was a considerable wrangle between the parties as reflected in further letters, which are annexed as before, with the applicants showing reluctance to produce all their books, including the balance sheets and with counsel for the applicants threatening – but not in fact doing so – to remove the matter to the High Court.

The copy of the minutes of the second hearing (Exhibit 2) record counsel for the applicants as saying at the outset:

“Mr. Kiwanuka [counsel for the applicants] quoted the Co-operative Societies Rules 1963, 42. (2) (b) which provides that ‘Every order of reference under this rule shall – (b) set out the dispute and full particulars thereof’; Mr. Kiwanuka said that there had been no reference complying with this rule and the particulars were not known. The arbitrator did not agree with Mr. Kiwanuka’s statement because both parties had agreed to the reference given to them by the Registrar and they had already participated in this arbitration. Mr. Kiwanuka said that it was a statement which he had made.”

Counsel for the applicants, having made his protest, seemed content to continue to participate in the arbitration. In fact it was not until the fourth hearing, on September 13 to 15 – by which time the typewritten copy of the proceedings had run to nearly two hundred pages – that counsel for the applicants, objecting to an order to produce books about a building which the applicants had erected in Masaka, brought the proceedings to a halt by applying for the order of prohibition.

Bearing in mind that the Registrar is not a qualified lawyer, I should have thought that the letter (Exhibit B.2), which is couched in very wide terms – “mismanagement” can cover a multitude of sins – read with the subsequent correspondence, which in my view is permissible, and in which counsel for the applicants actively participated, sufficiently defined the dispute and gave the necessary particulars. I am by no means satisfied that the member societies were not entitled to question the parent union about the purchase of the house. If it were not strictly within the order of reference, does it mean that the mere asking of questions about it frustrated the whole proceedings? Rules 43 and 44 of the Rules provide that proceedings before an arbitrator shall, as nearly as possible, be conducted in the same manner as proceedings before a court of law. If, for example, a judge or magistrate admitted matter which was not covered by the pleadings, or gave a wrong ruling on the admissibility of evidence, then that could be cured on appeal. Section 69 of the Act gives a right of appeal against any decision of the Registrar on a question of law. Even if the Chief Justice has not made any rules of court regulating practice and procedure for the hearing of appeals under s. 69 (2), the right of appeal is still there. However, the applicants have not sought to challenge the Registrar’s order of reference under this section.

Prohibition lies only for excess or absence of jurisdiction. It does not lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings: 11 Halsbury’s Laws (3rd Edn.), p. 114. I do not agree with counsel for the applicants’ submission that it lies as of right as there is no defect of jurisdiction apparent on the face of the proceedings: Halsbury (ibid., p. 115). It is a discretionary remedy and the Court may decline to interpose, by reason of the conduct of the party. Counsel relies on *Farquharson v. Morgan* ([1894] 1 Q.B. 552) as authority for the proposition that acquiescence in the exercise of jurisdiction by the inferior court is no bar to the issue of prohibition, but in that case there was a total absence of jurisdiction apparent on the face of the proceedings, which is not the case here.

On the other hand, in *Mouflet v. Washburn* ((1886), 54 L.T. 16), Sir James Hannen, following Erle, J., in *Jones v. James* ((1850), 1 L.M. & P. 65), decided

that the defendant, by once appearing before the county court judge, had waived the right of examining into the process by which he had been summoned to appear, and that a subsequent application by such defendant for a writ of prohibition to prevent the judge of the county court from proceeding in such suit must be refused. A court may also decline to interpose if there is a doubt in fact or law whether the inferior tribunal is exceeding its jurisdiction or acting without jurisdiction: 11 Halsbury's Laws (3rd Edn.), p. 116. I entertain such a doubt.

The only other matter is that the order of reference did not limit the time within which the award should be forwarded by the arbitrator, as is made mandatory by r. 42 (2) (c) of the Rules. I agree that it should have done so, but the applicants' proper remedy was to appeal, and not to apply for a prohibition. As was said by Grove, J., in *Barker v. Palmer* ((1881), 8 Q.B.D. at p. 11):

"... The County Court Act, 1850 (s. 14), gives an appeal in the largest terms, where a party is dissatisfied with the direction or determination of the court 'in point of law'. Therefore, assuming prohibition would lie, I see nothing here to take away the right of appeal. But I am inclined to think that the defendant has not a remedy by prohibition. I never heard that prohibition would lie where a question of time merely was involved. All the practice has been to the contrary. There is much in Comyn's Digest (tit. 'Prohibition') to show that, in general, prohibition lies where a court has acted without having any jurisdiction whatever over the subject-matter of the action. Here the county court judge and jurisdiction over the subject-matter, subject to certain rules with respect to time which were incident to that jurisdiction. I think, therefore, that prohibition does not lie here; that, even if it does, the defendant has a right of appeal; that the county court judge was wrong in hearing the case, and that this rule should be made absolute."

For the above reasons the application is dismissed with costs.

Application dismissed.

For the applicant:

BKM Kiwanuka

Kiwanuka & Co, Kampala

For the respondent:

C Mboijana

Mboijana & Co, Kampala

For the arbitrator:

MB Matovu (Senior State Attorney, Uganda)

Jivraj v Devraj
[1968] 1 EA 263 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment: 31 January 1968

Case Number: 48/1967 (54/68)

Before: Sir Charles Newbold P, Sir Clement de Lestang V-P and Spry
JA

Sourced by: LawAfrica

Appeal from: High Court of Kenya – Chanan Singh, J

[1] *Rent Restriction – Recovery of possession – Increase of Rent Restriction Act 1959; Rent Restriction (Amendment) Act 1966 – Tenancy terminated and proceedings for possession filed before amending Act came into force – Whether Act retrospective.*

[2] *Stare decisis – Court of Appeal – Whether court should apply English Court of Appeal decision even if wrong – Decision on property rights followed for many years.*

[3] *Statute – Interpretation – Retrospective effect of amendment – Pending legal proceedings – Increase of Rent Restriction Act 1959, as amended by Rent Restriction (Amendment) Act 1966, ss. 10 (2) and 13 (1) (2) – Interpretation and General Provisions Act, s. 23 (3) (K.).*

Editor's Summary

The plaintiff/appellant let his premises in Nairobi in 1960 to the defendant/respondent on a monthly tenancy, which was duly determined by a notice to quit effective on June 30, 1966. The defendant did not quit and on November 23, 1966, the plaintiff filed suit, claiming (*inter alia*) possession and mesne profits. On December 20, 1966, the Rent Restriction (Amendment) Act 1966 came into force, and brought the premises within the Rent Restriction Act. At the trial the sole issue was whether the amending Act had retrospective effect. The trial judge (relying largely on *Remon's* case (1)) decided that the amending Act did operate retrospectively so as to prevent the plaintiff from obtaining an order for possession. The plaintiff appealed.

Held – the amending Act did not have retrospective effect so as to prevent the plaintiff in pending proceedings from obtaining possession from a person who had ceased to be a tenant before the amending Act became effective. (*Remon v. City of London Property Co. Ltd.* (1) and *Hutchinson v. Jauncey* (5) distinguished.)

Observations obiter on *Remon's* case (1) disapproving (per Newbold, P., and Spry, J.A.) the decision in that case but leaving open whether or not it should be followed.

Appeal allowed. Defendant ordered to deliver up possession within three months. Enquiry ordered as to mesne profits and water and sweeper charges (in default of agreement).

Cases referred to in judgment:

- (1) *Remon v. City of London Property Co. Ltd.*, [1921] 1 K.B. 49.
- (2) *Durga Dass v. Gurdip Singh*, Kenya High Court Civil Case No. 1327 of 1966 (unreported).
- (3) *Noronha v. Devji and Others*, [1954] A.C. 49.
- (4) *Karmali v. Mulla*, [1967] E.A. 179.
- (5) *Hutchinson v. Jauncey*, [1950] 1 K.B. 574.

- (6) *Jonas v. Rosenberg*, [1950] 2 K.B. 52.
- (7) *Prout v. Hunter*, [1924] 2 K.B. 736.
- (8) *Leslie & Co. v. Cumming*, [1926] 2 K.B. 417.
- (9) *Turner v. Baker*, [1949] 1 K.B. 605.
- (10) *Dobson v. Richards*, [1919] W.N. 166; 63 Sol. Jo. 663.

January 31, 1968. The following considered judgments were read.

Judgment

Sir Charles Newbold P: The appellant (hereinafter referred to as the plaintiff) is the owner of certain premises in Nairobi. In 1960, by a verbal contract, he let those premises on a monthly tenancy to the respondent (hereinafter referred to as the defendant). This tenancy was duly determined by a notice to quit effective on June 30, 1966. The Rent Restriction Act (Cap. 296) (hereinafter referred to as the principal Act) in force during the period of the tenancy did not apply to the premises. The defendant did not quit, so on November 23, 1966, the plaintiff filed a suit seeking an order for delivery of the premises, mesne profits, the payment of certain water and sweeper charges, and interest.

On December 20, 1966, the Rent Restriction (Amendment) Act 1966 (No. 37 of 1966 and hereinafter referred to as the amending Act) came into operation and it brought the premises within the ambit of the principal Act. In January, 1967, the defendant filed a defence claiming, *inter alia*, that the plaintiff was not entitled to an order for possession by reason of the provisions of the amending Act. When the suit came on for trial, by agreement the sole issue for decision by the court was “whether the suit premises are retrospectively subject to the Rent Restriction Act 1959, as amended by the Rent Restriction (Amendment) Act, No. 37 of 1966”. The terms of the orders which were to follow the answer to this issue were also agreed. On the hearing of the appeal counsel for the defendant/respondent generously accepted that should the appeal be successful the agreed form of order should include a reference to the amounts claimed in respect of water and sweeper charges, as a reference to these charges had inadvertently been omitted from the agreed form of order. It was also agreed by both counsel for the defendant/respondent and counsel for the plaintiff/appellant that the issue agreed upon was to be regarded as posing the question whether the amending Act applied so as to prevent the plaintiff from obtaining the order for possession which he sought in his plaint.

The trial judge held that the amending Act operated retrospectively so as to prevent the plaintiff from obtaining an order for possession. In coming to that conclusion he relied largely on the principle contained in *Remon v. City of London Property Co. Ltd.* ([1921] 1 K.B. 49) and an unreported decision of Rudd, J., in *Durga Dass v. Gurdip Singh* (Kenya High Court Civil Case No. 1327 of 1966). In which the principle in the *Remon* case was also relied on. The trial judge, however, appreciated that there appeared to be, as he put it, “no theoretically sound answer” to the objection to the amending Act applying to persons who had ceased to be tenants before the commencement of that Act.

Counsel for the plaintiff/appellant submitted that both under the common law and under s. 23 of the Interpretation and General Provisions Act (Cap. 2) pending legal proceedings are not affected by any change in the law unless the amending Act shows, either expressly or by necessary implication, an intention that the new provision should operate retrospectively and affect those proceedings; and he submitted that s. 13 of the amending Act showed a clear intention that those provisions should not operate retrospectively. He also submitted that the judge, in arriving at his decision, had failed to consider that basic principle of the law and the decision in *Noronha v. Devji* ([1954] A.C. 49), and had failed to appreciate that in the *Remon* case there were no pending legal proceedings. Counsel for the defendant/respondent submitted that rent restriction legislation was peculiar in that the law to be applied was the law at the date of the judgment and not that at the date of the inception of the legal proceedings; and that this arose from the decisions that on the commencement of any such legislation an ex-tenant in

possession of premises to which the legislation applies acquires the

status of a statutory tenant and thus comes within the legislation, no matter when the legal proceedings were instituted. Counsel for the defendant/respondent also referred to a decision of Wicks, J., in *Karmali v. Mulla* ([1967] E.A. 179), which though given under different legislation, followed the principle set out in the *Remon* case (*supra*). He also submitted that s. 15 (4) of the principal Act, as amended by the amending Act, showed a clear intention that the legislation should operate retrospectively.

As the plaintiff had given the defendant a valid notice to quit effective on June 30, 1966, after that date the plaintiff was entitled under common law to bring an action for the recovery of the premises and the ejectment of the defendant therefrom. When the plaintiff filed his plaint on November 23, 1966, s. 15 (1) of the principal Act, which provides that “no order for the recovery of possession of any premises or for the ejectment of a tenant therefrom shall be made unless . . .” certain conditions are fulfilled, did not apply as the premises were not premises to which the principal Act applied nor was the defendant a tenant. When the amending Act came into operation bringing premises of the class of which the defendant had previously been the tenant within the ambit of the principal Act, the question which then arose was whether the defendant, who was wrongfully in possession of these premises, could be regarded as being a tenant within the meaning of the words quoted above in s. 15 (1). The principle contained in the *Remon* case ([1921] 1 K.B. 49) was that he could be. This in effect meant that the normal law to be applied in rent restriction cases was that at the date of judgment and not that at the date when the legal proceedings were initiated. The *Remon* case was a decision in 1921 of the English Court of Appeal, which decision was followed nearly thirty years later by the English Court of Appeal in *Hutchinson v. Jauncey* ([1950] 1 K.B. 574). As the rent restriction legislation of Kenya is similar in a number of respects to that of England and has the same basic object, decisions of the English Court of Appeal are not lightly to be disregarded. On the other hand, as the principle contained in the *Remon* case would seem to be contrary to a basic principle of the common law and to the principle contained in s. 23 of the Interpretation and General Provisions Act, it is necessary to examine the judgments in the *Remon* case in order to ascertain the reasoning which led to the enunciation of the principle.

Where a person has ceased to be a tenant at a date prior to the date on which an amending Act comes into operation normally that person could not be regarded as a tenant at the date of the amending Act. The judges in the *Remon* case appreciated that it would be straining the meaning of the word ‘tenant’ to include within it a person whose tenancy had been duly determined and who had no right to be in possession of the premises at the date when those premises came within the ambit of the legislation but who nevertheless had wrongly continued in possession. They considered, however, having regard to the object of the legislation, which was the protection of certain tenants, that the intention of the legislature would be defeated unless they gave to the word ‘tenant’ a strained and unnatural meaning. I consider that the judges failed to appreciate that the amending Act would, without any straining of the meaning of tenant, have applied naturally to all tenants, no matter whether the tenancy originated prior to or subsequent to the commencement of the amending Act, so long as they were still tenants in the ordinary meaning of that word when the amending Act came into operation. In other words, the judges, in order to protect a very small class of persons, that is persons who if their tenancy had continued would have come within the protection of the amending Act but whose tenancy had been lawfully determined prior to the operation of the Act and who had wrongly continued in possession until the Act came into operation, gave a strained and unnatural meaning to a word and thereby infringed rights which had crystallised before the legislation came into effect without there being any

express or necessary implication in the legislation itself that such rights were to be affected. It cannot be said that merely because the legislation was designed to protect a certain section of the community, that is tenants, therefore there was a necessary intention that the legislation should have retrospective effect, as otherwise all legislation designed to protect either a section of the community or the community as a whole would, ipso facto, have retrospective effect. That is clearly not the law. I consider that the decision in the *Remon* case ([1921] 1 K.B. 49) was a wrong decision and the reasoning on which it was based was false.

There is a principle of law, however, that where a court has interpreted the law in a certain manner, particularly an interpretation which affects property rights, and that interpretation has been acted upon for a considerable time, then that interpretation should not be departed from unless it is clearly wrong and gives rise to injustice. The principle in the *Remon* case, has, so far as I am aware, been acted on for a considerable time and in addition to the decision the subject of this appeal, we have been referred to two other decisions of the Kenya High Court which have adopted the *Remon* principle. Thus unless it is possible to say that on the facts of this appeal there are circumstances which enable the *Remon* case to be distinguished, it would then arise for consideration whether, even if the decision in the *Remon* case was wrong, it would result in more injustice to depart from that principle than to adhere to it.

Counsel for the plaintiff/appellant submitted that there was a clear distinguishing feature, which was that in the *Remon* case there were no pending legal proceedings when the amending Act came into operation. This, in my view, constitutes a clear distinction from the *Remon* case. It was, I have no doubt, this distinguishing feature which enabled the Privy Council in *Noronha v. Devji* ([1954] A.C. 49) to hold on appeal from this court that an amending Rent Restriction Act did not affect legal proceedings though this court, following the principle in the *Remon* case, had earlier held that it did, without mentioning in its judgment any of a large number of cases, including the *Remon* case, to which the Board had been referred in the course of argument.

Though the *Remon* case can clearly be distinguished on that ground it is impossible to do the same with *Hutchinson v. Jauncey* ([1950] 1 K.B. 574) to which both counsel for the defendant/respondent and counsel for the plaintiff/appellant referred, as in that case there were pending legal proceedings. A careful examination of the reason for the decision in that case, however, shows that while the court was following the principle of the *Remon* case in the meaning of the word 'tenant', nevertheless, as there were pending legal proceedings when the amending Act came into operation, the amending Act was only held to apply because on the construction of certain sections of that Act it was held that there was a necessary intention that the amending Act should have retrospective operation. Even, therefore, if this court were to hold, following the *Remon* case, that the word tenant could include a person who had ceased to be one before the Act came into operation, is there anything in the amending Act which shows that it was intended to affect legal proceedings which had been instituted before the amending Act came into operation, as opposed to those which were instituted subsequently? In my view, s. 13 (2) of the amending Act, which provides that any obligation, proceeding or other matter pending under the principal Act before the commencement of the amending Act shall be determined under the principal Act as if the amending Act had not been enacted, shows a clear intention that the amending Act should not affect pending legal proceedings. It is true that the proceedings in this case were not proceedings pending under the principal Act, but the necessary implication from s. 13 (2) is that the amending Act is not to have retrospective operation. I accept counsel for the defendant/respondent's submission that s. 15 (4) of the principal Act shows an intention that section should have retrospective operation, but whether that section

as amended should have retrospective operation is a matter, I think, to be determined by the amending Act and not by the principal Act.

In my view, therefore, the trial judge was wrong in coming to the conclusion that the amending Act prevented the plaintiff from obtaining an order for possession and he should have answered the issue in the negative and made the agreed order. I would, accordingly, allow the appeal with costs, with a certificate for two advocates. I would substitute for the judgment and decree of the High Court a judgment and decree ordering the defendant to deliver up possession of the premises within three months from the date of this judgment and ordering an enquiry as to mesne profits and water and sweeper charges, unless the parties agree a figure as to such profits and charges, with interest thereon at court rates. I would also order that the plaintiff would be entitled to the costs of the suit on the higher scale but I would not make an order for the costs of two advocates. As the other members of the court agree it is so ordered.

Sir Clement De Lestang V-P: I have had the advantage of reading in draft the judgment prepared by my lord President, and I agree with it but as we are differing from the decision of the trial judge I think I should express my views in my own words. I will not repeat the facts which are fully set out in the judgment of my lord President. I have not found this an easy case to decide but after much thought and careful consideration of the able and exhaustive arguments of counsel on both sides I have come to the conclusion that its decision depends on the correct answer to either of two questions; namely whether there was a “letting” within the meaning of the Increase of Rent Restriction Act 1959 (hereinafter called the principal Act) at the time the plaint was filed, and, if not, whether the Rent Restriction (Amendment) Act 1966 (hereinafter called the amending Act) has retrospective effect. My reasons for arriving at this conclusion are briefly the following. It is a well-known principle of law that, “in general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights”; Maxwell on Interpretation of Statutes (10th Edn.), p. 221. This principle is embodied in our written law, namely s. 23 (3) of the Interpretation and General Provisions Act (Cap. 2 of the Laws of Kenya) which provides, *inter alia*:

“Where a written law repeals in whole or in part any other written law, then, unless a contrary intention appears, the repeal shall not –

- (a) ...
- (b) ...
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or
- (d) ...
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.”

It has been held, however, by the English courts, notably in *Jonas v. Rosenberg* ([1950] 2 K.B. 52), following *Hutchinson v. Jauncey* ([1950] 1 K.B. 574), that principle does not strictly apply in the case of premises which are brought within and intended to be protected by rent restriction legislation. The reason for this seems to me, as I understand the English cases, to be that the changes which are made from time to time in that kind of legislation in England are intended

to be retrospective and, indeed, in *Hutchinson's* case (*supra*), it was expressly held that the provisions upon which the tenant relied for protection had retrospective effect. This explains in particular the decision in *Jonas v. Rosenberg* (*supra*), one of the cases on which counsel for the defendant/respondent relies, in which the law as it existed at the date of the judgment was applied although an amendment to the law was made between the date of the trial and the delivery of the judgment.

To take a rent restriction case out of the application of the principle stated above it is nevertheless necessary, and the English courts have so held in a number of cases, notably, *Prout v. Hunter* ([1924] 2 K.B. 736); *Leslie & Co. v. Cumming* ([1926] 2 K.B. 417); and *Turner v. Baker* ([1949] 1 K.B. 605), that the question whether there is a “letting” within the properly applicable legislation must be decided on the facts existing at the date of the issue of the plaint. This was accepted as being right in *Hutchinson's* case also and appears to me to have been applied by Lord Reading, C.J., in *Dobson v. Richards* ([1919] W.N. 166). In the latter case, although the action was filed after the enactment of the law bringing the premises within the ambit of the rent restriction legislation, Lord Reading, C.J., said that it was said that the Act was not retrospective but he had to look at the position at the date of the writ. He went on to say that at that date there was a tenancy at sufferance and accordingly the tenant was protected.

In *Noronha v. Devji* ([1954] A.C. 49) the Judicial Committee of the Privy Council held that s. 13 (3) of the General Clauses Ordinance of Kenya, which is substantially the same as s. 23 (3) of the Interpretation and General Provisions Act, already referred to, was in accordance with the principle which I have enunciated at the beginning of this judgment. It further held that the Increase of Rent (Restriction) Ordinance 1949, which had repealed and replaced previous legislation on the subject did not affect pending proceedings since no contrary intention appeared in the Act.

Having thus stated, with clarity I hope, my reasons, I proceed to answer the two questions I have posed above.

As regards the first, whether there was a “letting” under the relevant Acts at the time of the plaint, the answer is plainly no. Until December 20, 1966, the premises in suit were not subject to control. Long before that date the tenancy had been properly determined by a notice to quit and at the date of the plaint on November 23, 1966, the tenant was not a tenant at all but a trespasser holding over against the will of his landlord. There could not therefore be a “letting”, not even in the extended meaning given to that term in *Remon v. City of London Property Co. Ltd.* ([1921] 1 K.B. 49), until the coming into force of the amending Act on December 20, 1966.

As regards the other question, whether the amending Act operated retrospectively so as to protect the ex-tenant, I can see nothing in that Act indicating, even remotely, a retrospective intent. On the contrary, ss. 10 (2) and 13 (1) (2) appear to me to negative any such intention. The former refers merely to future proceedings and the latter preserves pending proceedings under the principal Act. I doubt if s. 15 (4) of the principal Act is truly retrospective. It is true that it applies to a limited number of orders made in the past but its purpose is clearly I think to provide machinery for dealing with uncompleted matters in the future. Incidentally the amending Act has made nonsense of s. 15 (4) of the principal Act in substituting “tribunal” for “court” in “both places” in this section while “court” appears in three places. To make any sense it seems to me that the substitution must apply to all three. Whether or not s. 15 (4) shows a retrospective intent it is, however, in my view irrelevant for the decision of the present appeal. Neither the principal Act nor the amending Act contain any reference,

either express or implied, to proceedings like the present which are not brought under the rent restriction legislation but under the ordinary law of the land.

The learned trial judge relied entirely on *Remon's* case. Although the court in that case admittedly strained the language of the English Act in order to give effect to the presumed intention of the legislature I think that this court would follow it since our rent restriction legislation is taken from the English legislation on the subject and it has been applied in England for nearly half a century. It is however clearly distinguishable from the present case by the fact that in *Remon's* case the proceedings were instituted after the Act, which brought the premises under rent restriction control, came into force, while in the instant case they were instituted before. *Hutchinson's* case ([1950] 1 K.B. 574), on which counsel for the defendant/respondent also relies, is likewise distinguishable by reason of the fact that in my judgment the amending Act is, unlike the Landlord and Tenant (Rent Control) Act 1949 of England, not retrospective.

For these reasons I would allow this appeal and I agree with the order proposed by my lord President.

Spry JA: I also agree. I am satisfied, relying on *Noronha v. Devji*, ([1954] A.C. 49), that the High Court had jurisdiction to hear this suit. There are certain technical differences between the statutes concerned, but the same principle must, I think, apply.

I am satisfied, also, that the Rent Restriction (Amendment) Act 1966 does not have retrospective operation. It is certainly not made retrospective in express terms and I can see no such necessary implication. Section 13 indicates the reverse and even sub-s. (4) of s. 15 of the Rent Restriction Act (Cap. 296), as amended by the 1966 Act, on which counsel for the defendant/respondent particularly relied, cannot, in my opinion, properly be referred to as retrospective. It is true that it refers to orders made before the passing of the Act but not to invalidate them, but merely to give the tribunal power, in future, to review them. I confess that I have found some difficulty in distinguishing the present case from *Hutchinson v. Jauncey* (*supra*), but there are material differences between the statute with which the court was there concerned and that which we are now examining and the judgments in that case leave me in doubt as to the passages on which the court relied as indicating a retrospective intent.

I should also like expressly to associate myself with the comments made by my lord the President on the case of *Remon v. City of London Property Co. Ltd.* (*supra*).

Appeal allowed. Defendant ordered to deliver up possession within three months. Enquiry ordered as to mesne profits and water and sweeper charges (in default of agreement) with interest.

For the appellant:

JA Mackie-Robertson, QC and KA Shah
Kantilal A Shah & Co, Nairobi

For the respondent:

DN Khanna and RN Khanna
Khanna & Co, Nairobi

Re an Application by the American Cyanamid Co

[1968] 1 EA 270 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 2 May 1968
Case Number: 49/1967 (56/68)
Before: Sheridan, J
Sourced by: LawAfrica

[1] Trade Marks – Application to register – “Abate” – Descriptive or distinctive – Whether word can refer to goods without being adjectival – Whether word has direct reference to character and quality of pharmaceuticals, etc. – Appeal from refusal by Registrar to register.

Editor’s Summary

The applicants applied to register the trade mark “Abate” in Part A of the Register in respect of pharmaceuticals, insecticides, fungicides, etc. in class 5. The Registrar of Trade Marks rejected the application on the ground that the mark was purely descriptive and not distinctive.

Held – the word “Abate” did not have a direct reference to the character and quality of the goods in the context of the common parlance of the ordinary man in the street in Uganda.

Appeal allowed. Registrar of Trade Marks directed to enter the mark.

Cases referred to in judgment:

- (1) *Keystone Knitting Mills Ltd.’s Application* (1928), 45 R.P.C. 421.
- (2) *Telemeter Trade Mark*, [1964] R.P.C. 92.
- (3) *“Heavenly” Trade Mark*, [1967] R.P.C. 306.
- (4) *Shredded Wheat Coy. v. Kellogg Coy. of Great Britain* (1940), 57 R.P.C. 137.
- (5) *Hotpoint Electric Heating Co.’s Application*, [1921] 38 R.P.C. 63.
- (6) *Yorkshire Copper Works, Ltd. v. Registrar of Trade Marks*, [1954] 1 All E.R. 570; [1954] 1 W.L.R. 554.

Judgment

Sheridan J: This is an appeal by notice of motion under r. 116 of the Trade Marks Rules, made under s. 41 of the Trade Marks Act (Cap. 83), for an order that the decision of the Registrar of Trade Marks, dated September 13, 1967, whereby he refused to make an entry in the register of trade marks of the mark “Abate”, be revised and for an order directing him to accept the application for the registration of the said mark.

On April 22, 1966, the applicants, the American Cyanamid Company which is incorporated in the United States of America, through their advocates, Messrs. Hunter and Grieg, filed with the Registrar an

application (annexure A to the supporting affidavit of Mr. A. B. Ssenkooba) for registration of the trade mark “Abate” in part A of the register in respect of pharmaceuticals, insecticides, fungicides, herbicides and veterinary preparations as enumerated in class 5 of the classification of goods (Schedule III to the Rules). By a letter dated May 12, the Registrar refused the application on the ground that the mark was purely descriptive and not distinctive (annexure B). On July 12, under r. 32 of the rules, there was a hearing before him. On September 9, he wrote to the applicants’ advocates rejecting the application (annexure C).

Under r. 34 of the Rules the advocates requested him to state in writing the grounds of, and the materials used by him in arriving at, his decision. He did so

by his “ruling” dated September 13, 1967 (annexure D). The relevant provisions of the Act are:

- “12. (1) In order for a trade mark (other than a certification trade mark) to be registrable in part A of the register, it must contain or consist of at least one of the following essential particulars:
- (d) a word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;
 - (e) any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the foregoing paras. (a), (b), (c) and (d), shall not be registrable under the provisions of this paragraph except upon evidence of its distinctiveness.
- (2) For the purposes of this section “distinctive” means adapted, in relation to the goods in respect of which a trade mark is registered or proposed to be registered, to distinguish goods, with which the proprietor of the trade mark is or may be connected in the course of trade, from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.
- (3) In determining whether a trade mark is adapted to distinguish as aforesaid the court or the Registrar may have regard to the extent to which;
- (a) the trade mark is inherently adapted to distinguish as aforesaid; and
 - (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact adapted to distinguish as aforesaid.
13. (1) In order for a trade mark to be registrable in part B of the register it must be capable, in relation to the goods in respect of which it is registered or proposed to be registered, of distinguishing goods, with which the proprietor of the trade mark is or may be connected in the course of trade, from goods in the case of which no such connection subsists, either generally or, where the trade mark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.
- (2) In determining whether a trade mark is capable of distinguishing as aforesaid the court or the Registrar may have regard to the extent to which;
- (a) the trade mark is inherently capable of distinguishing as aforesaid; and
 - (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact capable of distinguishing as aforesaid.
- (3) A trade mark may be registered in part B notwithstanding any registration in part A in the name of the same proprietor of the same trade mark or any part or parts thereof.”

The Registrar’s reasons for rejecting the application are set out in the following passage from the ruling:

- “3. In the first instance I will deal with Mr. Sengooba’s submission point by point. The first submission was on the ordinary meaning of the word and referred to The Concise Oxford Dictionary. It is true that this is a verb and not an adjective. The Act forbids registration of words having a direct reference to the quality or character of the goods. To say that a word cannot have a direct reference to the quality or character of the goods unless it is adjectival would be to give too restricted a meaning to this provision of the Act. In common parlance as well as at law the word has a clear meaning. The Concise Oxford Dictionary gives the following meanings: diminish, do away with (nuisance), mitigate (violence), (of epidemic) grow less. The

meanings accorded to the word are outstanding and the same word may very well be used in advertisements for advertising the goods under the mark.

4. In considering the suitability for registration of a mark the Registrar has to make a reference to, among others, s. 12 of the Act. Section 12 enumerates the essential particulars for registration of a mark and in s. 12 (1) (d) one such particular is that it should be 'a word or words having no direct reference to the character or quality of the goods'. It does not say adverbial or adjectival words. The term 'reference' has a much wider meaning than that. In my opinion a word could have a reference to goods although it is not an adjective. 'Earthmaster' is not an adjective, but it was held to have a direct reference to quality of the goods. There are a number of non-adjectival words which have been held to be words having direct reference to the quality and character of the goods.
5. The second point raised by Mr. Sengooa was that in relation to the goods the word has no meaning. I am unable to accept this. I have also pointed out the dictionary meanings of the word. If it is considered in relation to the goods under the specification set out the meaning would be only too obvious. In ordinary language disease or any sort of illness is referred to as a nuisance. To abate a nuisance is commonly understood. If the term is used in relation to epidemic or contagious diseases or any kind of pain for that matter it cannot be called a misuse of words."

Counsel for the applicants submits that the word "abate" has no direct reference to the nature and quality of the goods. He concedes that because the mark is a verb and not an adjective, that is not enough by itself to qualify for registration: "a mark which in adjectival form would be directly descriptive is little or nonetheless so because it is a noun or a verb": Kerly's Law of Trade Marks (9th Edn.), p. 250.

Apart from authority I would say that the general meaning of the word "abate" is "to lessen". The Registrar, who appeared in person, objected to the mark as in a pharmaceutical sense it might be used to connote the abatement of an epidemic or disease. That may be possible in a dictionary sense but in common parlance an epidemic is not abated. This is to be contrasted with abating a nuisance which has a technical legal meaning. Can it be said that the word "abate" is capable of having a meaning which has a direct reference to the character or quality of the goods? The test to be applied was stated by Lord Hanworth, M.R., in *Keystone Knitting Mills Ltd.'s Application* ((1928), 45 R.P.C., at p. 426):

"One has to look at the word which is registered, not in its strict grammatical significance, but as it would represent itself to the public at large who are to look at it and to form an opinion as to what it connotes."

In *Telemeter Trade Mark* ([1964] R.P.C. 92), G. W. Tookey, Q.C., in upholding the Registrar's refusal to register the word "Telemeter" as "adapted to distinguish" or being "capable of distinguishing" within the meaning of ss. 9 and 10 of the Trade Marks Act 1938 (ss. 12 (1) (e) and 13 of Cap. 83), said *ibid.* at p. 95):

"I do not consider that the definitions in Webster's Dictionary are particularly pertinent, except as showing that 'Telemeter' is not an invented word. On the question of descriptiveness I consider that this is a clear case where the word proposed as a trademark, when used upon and in connection with the applicant's apparatus, will at once be recognized and used by the public as a purely descriptive name for the apparatus . . . It is the type of word which will satisfy the public as being apt to describe the apparatus with which they have previously been unacquainted and they will use the word so to describe it."

While it is permissible to check one's general knowledge by reference to dictionaries, such definitions should be approached with care: "*Heavenly*" *Trade Mark* ([1967] R.P.C. 306).

The word "abate" has no direct reference to the character of the goods in the sense that it names them: cf. "Shredded Wheat" in *Shredded Wheat Coy. v. Kellogg Coy. of Great Britain* ((1940), 57 R.P.C. 137). Nor is it purely descriptive of the physical nature of the article in question: cf. "Hotpoint" which, in respect of electric appliances for heating, cooking, washing and cleansing purposes, was held to refer to the character of the goods: *Hotpoint Electric Heating Co.'s Application* ((1921), 38 R.P.C. 63).

As regards a direct reference to the quality of the goods, it is a question of degree. I doubt if the word "Abate" is laudatory in the same sense as "Earth master" in relation to mechanical shovels or "Charm" in relation to ladies' stockings: Kerly's *Law of Trade Marks* (9th Edn.), p. 114. If the word had been, say, "Exterminate" it might have been different.

In the course of the hearing the Registrar conceded that he would have no objection to the registration under part A of insecticides for aquatic larvae. His real objection was to the registration of pharmaceuticals which, he contended, might be used to abate an epidemic. With respect I fail to see any appreciable difference.

While I am mindful of the warning of Lord Cohen in *Yorkshire Copper Works Ltd. v. Registrar of Trade Marks*, to which the Registrar referred in his ruling, that ([1954] 1 All E.R. at p. 576):

"Wealthy traders are habitually eager to enclose part of the great common of the English language and to exclude the general public of the present day and of the future from access to the enclosure. . . . The court is careful not to interfere with other persons' rights further than is necessary for the protection of the claimant, and not to allow any claimant to obtain a monopoly further than is consistent with reason and fair dealing."

I do not consider that the word "abate" has a direct reference – and I underline the meaning of the word "direct" – to the character and quality of the goods in the context of the common parlance of the ordinary man in the street in Uganda.

For these reasons it is not necessary for me to decide the alternative submission that the word has become distinctive by adaption under s. 12 (1) (e), (2) and (3) or is capable of distinguishing under s. 13 of the Act. Despite the letter (Exhibit A), which was admitted in evidence by consent at the hearing of the appeal, that the trade mark "Abate" has been registered in sixteen countries, there is an absence of evidence of user in Uganda. Nevertheless, I think that the Registrar misdirected himself in cursorily dismissing the applicant's alternative submission for registration under part B, where different considerations, including the shifting of the onus of proof against registration on to him, obtained.

I direct that the Registrar enter the mark "Abate" under Part A of the Register.

Under s. 48 of the Act I make no order as to costs.

Order accordingly.

For the applicant:

CTS Belk

Hunter and Grieg, Kampala

Registrar of Trade Marks, Uganda

Registrar of Trade Marks, appeared in person:

GS Lule

Elgood v Regina
[1968] 1 EA 274 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 2 April 1963
Case Number: 163/1962 (57/68)
Before: Sir Ronald Sinclair P, Sir Trevor Gould Ag V-P and Newbold JA
Sourced by: LawAfrica
Appeal from: Supreme Court of the Seychelles at Victoria – Bonnetard, C.J

[1] Appeal – Additional evidence – Application to admit on criminal appeal – Principles which appellate court will apply – Specialist medical evidence not available at trial – Eastern African Court of Appeal Rules 1954, r. 42.

[2] Criminal Law – Abortion – Procuring drugs intended to be used to procure miscarriage – Observations as to intent of accused – Penal Code, s. 149 (Seychelles).

[3] Evidence – Appeal – Admission of additional evidence – Principles upon which appellate court acts – Criminal appeal – Specialist medical evidence not available at trial Eastern African Court of Appeal Rules 1954, r. 42.

Editor's Summary

The appellant doctor was charged in the Supreme Court of the Seychelles with several counts of procuring for women drugs knowing that the drugs were intended to be used to procure miscarriages, contrary to s. 149, Penal Code. He was convicted upon medical evidence given for the prosecution by three doctors and inferences drawn from a statement made to the police by the appellant himself. Medical evidence was also given for the defence by three doctors. There was considerable disagreement between the medical witnesses, only one of whom had any special qualifications in the particular field concerned, and that one had only limited specialist knowledge. On appeal the appellant applied to call additional evidence, which was not available in the Seychelles, from a highly qualified and experienced specialist in obstetrics and gynaecology. This evidence was admitted, and it was to the effect that the treatment given by the appellant was perfectly legitimate therapeutic treatment which could not possibly lead to an abortion.

Held –

- (a) the principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purposes of the appeal

are:

- (i) the evidence that it is sought to call must be evidence which was not available at the trial;
- (ii) it must be evidence relevant to the issues;
- (iii) it must be evidence which is credible in the sense that it is well capable of belief;
- (iv) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial (*R. v. Parks* (1) applied; statement in *John Hasakwa v. R.* (2) disapproved);
- (b) it is only in very exceptional cases that the Court of Appeal will permit additional evidence to be called;
- (c) in the circumstances, in the interest of justice the application should be allowed;
- (d) the affidavit in support of an application to admit additional evidence should have attached to it a proof of the evidence sought to be given;
- (e) on consideration of the evidence, the charges could not be said to have been proved beyond reasonable doubt.

Observations on the question of the intent necessary to a charge under the section.

Appeal allowed. Conviction quashed.

Cases referred to in judgment:

- (1) *R. v. Parks*, [1961] 3 All E.R. 633.
- (2) *John Hasakwa v. R.*, Court of Appeal Criminal Appeal No. 132 of 1954 (unreported).

[**Editorial Note.** This judgment, hitherto unreported, is referred to so frequently on applications to admit additional evidence on appeal that it has been decided to publish it.]

Judgment

Newbold JA: read the following considered reasons for the judgment of the court: The appellant, a doctor, was charged on eight counts of procuring for a person a drug knowing that it was intended to be used to procure the miscarriage of a woman contrary to s. 149 of the Penal Code. The counts related to four women, two counts in respect of each woman, and the drug specified in the counts was in six cases quinine and in two cases ergometrine. The appellant was acquitted on four of these counts relating to two women in which the drug specified was quinine. He was, however, convicted by the Supreme Court of Seychelles on the remaining four counts in respect of two women, the drug specified being in two cases quinine and in two cases ergometrine, and was sentenced on each count to pay a fine of Rs. 500 or in default three months' imprisonment. From these convictions and sentences he appealed to this court and, after hearing additional evidence, we allowed the appeal, quashed the convictions and the sentences, and stated that we would give in writing our reasons both for hearing additional evidence and allowing the appeal.

The appellant, who was sixty-nine years old and at the relevant times was acting Director of Medical Services of Seychelles, was a Doctor of Medicine of Oxford University and a Fellow of the Royal College of Physicians of London. The period during which the offences were alleged to have been committed commenced on September 12, 1961, and terminated on December 20, 1961. On the four counts on which the appellant was convicted the offences were alleged to have been committed at the normal Wednesday clinic which the appellant held each week on government premises, with nurses either present or in the vicinity and in two cases administering the drug the subject of the count, and with the drugs charged in the counts provided by the government dispenser against prescriptions signed by the appellant. There was nothing clandestine about the treatment nor secret about the clinical notes relating to the treatment of the two women concerned – indeed one of the medical witnesses who gave evidence for the prosecution obtained these notes by the simple process of searching, in the absence of the appellant, the drawer of a desk used by the appellant when attending to his Wednesday clinic. Not one of the four women concerned in the eight counts charged gave any evidence that she had sought an abortion or had received from the appellant any drug which was intended to procure an abortion. Though in each case the woman was in fact pregnant at the time of the treatment, in no case did an abortion occur. All the drugs used in the treatment of all four women were used in normal therapeutic doses. In none of the cases was any reason even suggested for the appellant to pursue a criminal course of action. In effect the case for the prosecution rested entirely upon the views of three doctors, who gave evidence for the Crown, as to the treatment given by the appellant to the women concerned and the inferences which could be drawn

from a rather peculiar statement given by the appellant to the police in which the appellant referred to requests by some patients for quinine

as an abortifacient and to ergometrine as being an abortifacient drug. The views of these three doctors were based on the clinical notes made by, and the prescriptions given by, the appellant and not on any personal knowledge of the cases. Three doctors gave evidence for the defence, and their views are similarly based. There was a considerable amount of disagreement between the medical witnesses and in a number of cases there was a frank admission of a lack of any considerable experience in the particular field. In one case only did any medical witness have any special qualifications in the particular field and that was limited to a three months post graduate course during 1960 in obstetrics and gynaecology.

It was against this background that we considered an application by the appellant made under r. 42 of the Eastern African Court of Appeal Rules 1954, to call additional evidence which was to be given before us. The additional evidence which it was sought to call was that of a specialist in obstetrics and gynaecology, who was also a consultant at certain hospitals in those subjects and a lecturer and examiner at a university college in those subjects.

The principles upon which an appellate court in a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purposes of the appeal have been set out clearly in *R. v. Parks* by Lord Parker, C.J., as follows ([1961] 3 All E.R. at p. 634):

“Those principles can be summarised in this way: First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.”

The Attorney-General very properly drew our attention to a decision of this court in *John Hasakwa v. R.* (Criminal Appeal No. 132 of 1954) where, after holding that the additional evidence sought to be adduced in that case was both available at the trial and of a nature the relevant of which was appreciated at the trial, it was stated as follows:

“Furthermore, to allow these two men to give evidence before us on the lines of their affidavits would be to disregard another standard rule regarding the reception of additional evidence by an appeal court, namely, that such evidence, if received and believed, would be conclusive.”

In so far as that statement suggests that before additional evidence can be received it must be of such a nature that, if received and believed, it would be conclusive we consider that it no longer reflects the principles on which this court would now be guided in exercising its discretion.

We wish to stress that it is only in very exceptional cases that this court will permit additional evidence to be called. In this case it was not merely a matter of further medical evidence; it was a matter of medical evidence of a nature not available in Seychelles at the time of the trial and evidence which, having regard to the basis of the case for the prosecution, must, if believed, have had a great effect on the mind of the learned Chief Justice, especially having regard to the divergence of opinion of the medical witnesses who gave evidence. In these circumstances we considered that in the interest of justice we should exercise our discretion and allow the application to call additional evidence. While the affidavit in support of the application gave in broad outline the evidence it was proposed to lead, there should have been attached to the affidavit a proof of the

evidence to be given and this course should be followed in any future application of a similar nature.

Having granted the application to call additional evidence, Mr. Ormerod, whose special qualifications have already been referred to, gave evidence on oath before us and was examined by counsel for the appellant and cross-examined by the Attorney-General. In brief, his evidence was that the entire treatment given by the appellant to the two women concerned in the four counts on which the appellant was convicted was perfectly legitimate therapeutic treatment. He said there was nothing in the treatment which in his opinion could possibly result in an abortion. He further stated that there was nothing in the treatment which would lead any qualified doctor to think that an abortion might result from the treatment. Dealing with the actual treatment, he stated that all the drugs used were given in normal therapeutic doses; that it was proper to give the mild laxatives which were prescribed; that the quinine in 5 gr. tablets was properly given as a tonic without any danger, in the doses given, of an abortion, but that he had given up using quinine for this purpose as he considered that better drugs were now available; and that ergometrine was properly given in the doses used to stop bleeding, or threatened bleeding, whether it was a case of threatened or inevitable abortion. In cross-examination he was asked whether he would have used ergometrine in a case of threatened abortion if he had not possessed his special knowledge and had believed that it was an abortifacient drug. His reply was that he personally would not have done so.

We accept Mr. Ormerod's evidence and we feel sure that the learned Chief Justice would have done so if the evidence had been given before him. The result is that not only was the entire treatment perfectly legitimate therapeutic treatment but also there was nothing in it which could possibly lead to an abortion. This being so, any conviction of the appellant must depend on the belief of the appellant, however mistaken it might be, that the treatment would lead to an abortion and an intent on his part when he procured the particular drug specified in the count that the drug was to be used for that purpose. On this aspect of the appeal we should refer to a submission made by the appellant that to secure a conviction under s. 149 of the Penal Code it was necessary for the prosecution to prove that the recipient of the drug intended to procure the miscarriage, that the intention of the doctor procuring the drug was immaterial, and that in this case there was no evidence of any intention on the part of the women concerned to procure an abortion. We found it unnecessary in this case to arrive at any concluded opinion on the point but we were very inclined to the view that the intention of the person who procured the drug, whether he be the doctor or anyone else, was a very material element in any charge against that person of an offence against that section.

The Attorney-General submitted that the proper inference to draw from the statement of the appellant and his clinical notes and prescriptions, having regard to the beliefs, however mistaken they might be, of the appellant as disclosed in his statement, was that he intended the drug charged in the count to procure an abortion. We consider that it was possible to draw such an inference, but in all the circumstances we did not consider that such an inference was the only one which could be drawn nor that it was the most probable one.

We were completely satisfied that a conviction which depended, as these convictions must depend, on a possible inference which could be drawn from the statements and clinical notes of the appellant when all the other factors in the case were entirely in favour of the innocence of the appellant could not possibly be a case in which the charges against the appellant could be said to have been proved beyond reasonable doubt.

Appeal allowed.

For the appellant:

JE Thomas

JE Thomas, Victoria, Mahé, Seychelles

For the respondent:

A Sauzier (Attorney-General, Seychelles)

Attorney-General, Seychelles

Waihi and another v Uganda
[1968] 1 EA 278 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	13 March 1968
Case Number:	179/1967 (59/68)
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Fuad, J

[1] Evidence – Confession – Corroboration – Prior threat to kill – Whether sufficient corroboration.

[2] Evidence – Corroboration – Threat – Whether prior threat to kill can corroborate confession of murder.

[3] Evidence – Murder – Medical evidence – Death by natural causes not excluded – Whether conviction proper.

Editor's Summary

The two appellants were convicted of murder. The medical evidence about the cause of death was unsatisfactory and did not exclude the possibility of death from natural causes. The decomposed body of the deceased had been found buried fully clothed, enclosed in a sack, with a strip of elastic wound tightly round the neck and the hands tied behind the back. The main evidence against the appellants consisted of confessions made to a police officer by them. In addition there was evidence that the first appellant had been heard to say, about a month before the murder, that he intended to kill the deceased; and that the second appellant had been seen, about a week after the murder, with some of the deceased's property in his possession.

Held –

- (i) where there is medical evidence and it does not exclude the possibility of death from natural causes only in exceptional cases can a conviction for murder be sustained; but
- (ii) this was an exceptional case because the other evidence pointed irresistibly to an unlawful killing;

(iii) the prior threat by the first accused to kill the deceased corroborated his confession.

Observations on the admissibility and probative value of threats.

Appeals dismissed.

No cases referred to in judgment

Judgment

Spry JA: read the following considered judgment of the Court: The two appellants, Sulaimani Waibi and Samweri Balyekobali, were convicted of the murder of one Alfred Kadama.

The body of the deceased was found buried. It was fully clothed and enclosed in a sack. There was a strip of elastic wound tightly, but not knotted, round the neck and the hands were tied behind the back. The sack itself was tied with ropes. The body was decomposed, although the face was still recognisable.

The doctor who examined the body testified that he could find no sign of injury. He assumed from the presence of the elastic that death was due to strangulation, although he could find no medical evidence to support that conclusion. He could not say whether or not the hyoid bone was broken.

The main evidence against the appellants consisted of statements made to a police officer. These statements tell substantially the same story, although there are some discrepancies and each appellant tried to minimise his own part in the affair and to shift the major blame on to others. If the story told in these confessions is true, there can be no doubt that the deceased was deliberately murdered and that both appellants were at least sufficiently involved to be guilty as principal offenders under s. 21 of the Penal Code.

It may be observed that both confessions referred expressly to the event which is said to have provided the motive for the crime, to the strangling of the deceased by means of the elastic, to the burying of the body and to the stealing of the deceased's property.

At trials within the trial both appellants said that they signed their statements under duress but the learned judge, after taking into account the fact that the appellants had been in custody for a considerable time when they made their statements, held that both statements had affirmatively been proved to have been made voluntarily.

These confessions were reinforced by certain other evidence. First, there was the evidence of a brother of the appellant Sulaimani, one Balukani Waiswa, who said that Sulaimani had told him of his intention to kill the deceased, because the deceased had shot at him. The witness said that he advised Sulaimani against this course, because there was no proof that it was the deceased who had fired the shot, and this resulted in a quarrel between them.

Another witness, Daudi Namunya, a brother of the deceased, testified that the appellant Samweri, who was also a brother of the deceased, came to his house, bringing a basket, and asked to be allowed to stay. This appears to have been about a week after the deceased had died. The basket contained articles which were proved at the trial to have been the property of the deceased.

The learned trial judge held, notwithstanding the medical evidence, that the circumstantial evidence established beyond reasonable doubt that the deceased had been killed unlawfully by strangulation by means of the elastic. He said that he was satisfied that the statements were substantially true, although he expressed the opinion that this was not a case where a court could properly convict on the statements alone, in the absence of corroboration, nor was it a case where it would be prudent to use either statement as evidence against the maker of the other. He believed the evidence of Balukani Waiswa to have been the truth, after considering the fact that Waiswa had himself been detained for some time on suspicion of complicity in the murder, and he held that the expressed intention on the part of Sulaimani to kill the deceased was sufficient corroboration of his statement to the police. He accepted also the evidence of Daudi Namunya, while appreciating that he might have had a motive for incriminating Samweri, and held that the possession by Samweri shortly after the murder of property of the deceased corroborated his statement to the police. Accordingly, in agreement with both assessors, he found both appellants guilty of murder.

At the hearing of the appeal, Mr. Kakooza, who appeared for both the appellants, argued four grounds of appeal, and also argued generally that the case was unsatisfactory in many respects and, while conceding that there was evidence against both appellants, submitted that the case was not so complete or coherent as to warrant conviction. On this last point, it is sufficient to say that the learned trial judge was very much alive to the difficulties, commented on the apparent lack of proper investigation, and obviously only reached his conclusion after the most anxious examination of the evidence.

Mr. Kakooza's first submission was that the learned judge had not given sufficient weight to the

medical evidence and he argued that the appellants should not have been convicted in the absence of medical evidence as to the

cause of death. It may be added that, for the same reason, Mr. Deobhakta, who appeared for the Republic, was not disposed to support the conviction. Of course, such evidence is always desirable and usually essential, but there are exceptions. There have, for example, been several cases in East Africa where persons have been convicted of murder, although the body of the victim was never found and the case against the appellant depended entirely on circumstantial evidence. There may be other cases where medical evidence is lacking but where there is direct evidence of an assault so violent that it could not but have caused immediate death. On the other hand, where there is medical evidence and it does not exclude the possibility of death from natural causes, the task of the prosecution is very much harder and only in exceptional circumstances could a conviction for murder be sustained. We think this is such an exceptional case. The condition in which the body was found buried, with the elastic tightly round the neck and the hands tied behind the back, taken with the other evidence in the case, points irresistibly to an unlawful killing. We think any other supposition would be quite unreal. Mr. Kakooza suggested that this might have been an extraordinary tribal method of burial but there is no evidence whatsoever to support this hypothesis and it should not have been difficult to produce such evidence if there were any substance in the theory. Moreover, it was not put forward by either appellant. We reject this ground of appeal. We cannot but feel that the post mortem examination was performed somewhat perfunctorily.

Mr. Kakooza's second ground of appeal was that other persons had been named in the confessions, one of whom had been acquitted and others not charged. We think there is no merit in this ground of appeal.

The third ground of appeal was that the learned judge gave undue weight to the evidence of Balukani Waiswa and Daudi Namunya. It is quite true that there was good reason to view the evidence of both these witnesses with some suspicion, but the learned judge was alive to this and directed himself fully and carefully as regards each of these witnesses.

Mr. Kakooza did not raise the question whether the evidence of these witnesses constituted sufficient corroboration of the two statements, but we have considered this. So far as Samweri is concerned, we see no difficulty. The evidence, if true, that he was in possession of property belonging to the deceased shortly after the murder and the fact that he offered no explanation of such possession is ample corroboration of his confession. Where Sulaimani is concerned, the position is not quite so simple. Evidence of a prior threat or of an announced intention to kill is always admissible evidence against a person accused of murder, but its probative value varies greatly and may be very small or even amount to nothing. Regard must be had to the manner in which a threat is uttered, whether it is spoken bitterly or impulsively in sudden anger or jokingly, and reason for the threat, if given, and the length of time between the threat and the killing are also material. Being admissible and being evidence tending to connect the accused person with the offence charged, a prior threat is, we think, capable of corroborating a confession. On this basis, we have considered whether the evidence of the conversation between Balukani Waiswa and Sulaimani ought to be given sufficient weight to corroborate the latter's statement. We think it should. Clearly, Sulaimani was not speaking in jest, because his words, and Balukani's advice to him to refrain from his proposed action, led to a quarrel between the brothers. The reason Sulaimani gave, that the deceased had attempted to kill him, was a serious one. Lastly, the interval of time between the utterance and the killing appears to have been about a month which, in the circumstances, is not long enough to make the utterance irrelevant. We think, therefore, that both statements were sufficiently corroborated.

Mr. Kakooza's final submission was that the learned judge did not consider the absence of motive on the part of Samweri. We think the case against him was sufficiently strong that the lack of proved motive was not material.

As we have said, the learned judge considered all the difficulties which this case presented and directed himself correctly on the law involved. We see no reason to disagree with his conclusions and the appeal of each appellant is dismissed.

Order accordingly.

For the appellants:

CMB Kakooza

Kiwanuka & Co, Kampala

For the respondent:

AG Deobhakta (Senior State Attorney, Uganda)

Attorney-General, Uganda

Kenya Meat Commission v Commissioner of Income Tax

[1968] 1 EA 281 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	10 April 1968
Case Number:	56/1967 (60/68)
Before:	Sir Clement de Lestang V-P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Chanan Singh, J

[1] *Income Tax – Deduction – Donation to Kenya National Fund to be used for veterinary research – Whether allowable as expenditure of capital nature incurred “by” Kenya Meat Commission “wholly and exclusively” in production of income – Whether “for the purposes of a trade carried on” by the Commission – East African Income Tax (Management) Act 1958, s. 14 (1) and (2) (p) and s. 15 (1).*

[2] *Income Tax – Expenditure – Whether donation to Kenya National Fund to be used for research is expenditure of a capital nature – East African Income Tax (Management) Act, s. 14 (1) and (2) (p) and s. 15 (1).*

[3] *Income Tax – Income – Deductions – Whether East African Income Tax (Management) Act 1958, s. 14 (2) is governed by s. 14 (1).*

Editor's Summary

The Kenya Meat Commission made a donation of K. Shs. 200,000/- to the Kenya National Fund on condition that the money was used by the Director of Veterinary Services “in research and other work which will be of benefit to the Kenya beef and mutton industry”. The Commission, which had a statutory monopoly of the beef and mutton trade in Kenya, took care to ensure that the money was to be expended only on specific projects which would benefit that trade (and not, for example, the dairy industry). The Commissioner of Income Tax refused to allow this donation as a deductible expense, and his refusal was upheld (on appeal from the local committee) by the High Court of Kenya. The Commission then brought this further appeal, arguing that the donation was expenditure of a capital nature incurred on scientific research and therefore deductible under s. 14 (2) (*p*) of the East African Income Tax (Management) Act 1958. The Commissioner of Income Tax, on the other hand, argued (*inter alia*) that the donation was not deductible under that provision because it was not expenditure incurred “for the purpose of a trade carried on” by the Commission.

Held –

- (i) subsection 14 (1) and sub-s. 14 (2) of the East African Income Tax (Management) Act 1958 must be read independently; and the classes of expenditure set out in sub-s. 14 (2) are exceptions to the general rules set out in sub-s. 15 (1) of that Act;
- (ii) the donation was expenditure incurred “by” the Commission “wholly and exclusively” for the production of income: and was made “for the purposes of a trade carried on” by the Commission within s. 14 (2) (p) of the Act;
- (iii) therefore the donation was a deductible expense under s. 14 (2) (p) of the Act.

Appeal allowed.

No cases referred to in judgment

April 10, 1968. The following considered judgments were read:

Judgment

Spry JA: The appellant, the Kenya Meat Commission (to which I shall refer as the K.M.C.), when making its return of income for the year 1963 to the Commissioner of Income Tax, the present respondent, under the East African Income Tax (Management) Act 1958 (to which I shall refer as the Act), claimed to be entitled to deduct a sum of Shs. 200,000/- which it had contributed to the Kenya National Fund. The Commissioner disallowed that deduction and the K.M.C. appealed successfully to the local committee for Nairobi. The Commissioner appealed successfully to the High Court from the decision of the local committee and it is from the judgment and decree of the High Court that the present appeal is brought.

The facts are not in dispute. The K.M.C. offered to donate £10,000 to the Kenya National Fund, conditionally on the money being used by the Director of Veterinary Services “in research and other work which will be of benefit to the Kenya beef and mutton industry.” The Fund accepted the donation subject to that condition, as it was entitled to do, and after considerable delay specific projects were agreed and the money was handed over, with accrued interest, by the Fund to the Director of Veterinary Services.

The case for the K.M.C. is that this donation was expenditure of a capital nature incurred on scientific research and so a legitimate deduction by virtue of s. 14 (2) (p) of the Act. The case for the Commissioner is that the donation was a gift to a public charity and so not deductible.

The learned trial judge, after dealing at length with matters of procedure with which this appeal is not concerned, disposed of the substance of the matter briefly. He held, as matters of law, first, that sub-s. (2) of s. 14 of the Act is governed by sub-s. (1), so that to be a permitted deduction any expenditure must be incurred “wholly and exclusively” for the production of the taxpayer’s income; and, secondly, that a payment made to a Government department could not be said to be expenditure incurred “by” a taxpayer. He found that the contribution made by the K.M.C. to the Kenya National Fund was not expenditure incurred “by” the K.M.C. nor was it “wholly and exclusively” for the production of its income. He therefore allowed the appeal, without considering the other points that had been raised.

Mr. Hewett, for the K.M.C., attacked both these findings. He submitted that a person incurs expenditure for work if he pays for the doing of the work, it is not necessary for him to do the work personally. A great deal of work is done today through independent contractors, as, for example where building and transport are concerned, and it would be absurd to suggest that money paid to

such a contractor is not expenditure incurred by a taxpayer. For myself, I find that argument irresistible.

Furthermore, I do not understand why the learned judge specifically referred to Government departments. If a Government department provides services to the public on payment of charges, as several Government departments do, it is, as I see it at least *prima facie* no different from any other contractor.

The second question is less easy. Section 14 (1) of the Act provides that:

“For the purpose of ascertaining the total income of any person for any year of income there shall be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of such income and which is not expenditure in respect of which no deduction shall be allowed under s. 15; . . .”

Sub-section (2) of s. 14 begins:

“Without prejudice to the operation of sub-s. (1), in computing the gains or profits for any year of income chargeable to tax . . ., the following amounts shall be deducted.”

There follow various permissible deductions, some of which are not expenditure and several of which are expenditure of a capital nature. These include:

“(p) any expenditure of a capital nature incurred by any person on scientific research for the purposes of a trade carried on by him.”

Section 15 (1) reads:

“Subject to sub-ss. (2), (3), (4) and (5) of s. 14, for the purposes of ascertaining the total income of any person for any year of income, no deduction shall be allowed in respect of

- (a) any expenditure or loss which is not wholly and exclusively incurred by him in the production of the income;
- (b) any capital expenditure, or any loss, diminution or exhaustion of capital.”

Mr. Hewett argued that sub-ss. (1) and (2) of s. 14 must be read independently. He submitted that “Without prejudice to . . .” cannot mean the same as “Subject to . . .”. If there was any doubt, it was, he submitted, removed by s. 15 (1), which is expressly made subject to s. 14 (2).

I do not understand what purpose was intended to be served by the words “Without prejudice to . . .”, but after comparing s. 14 (1), s. 14 (2) and s. 15 (1), I think Mr. Hewett’s submission must be correct. Section 14 (1) allows the deduction of expenditure wholly and exclusively incurred in the production of the income for the year in question. It should be noted that the sub-section does not say that *only* such expenditure is to be deducted. Section 14 (2) allows certain other deductions of an entirely different nature. They include bad debts, which are not expenditure and which, while they result from giving credit presumably in order to obtain business, cannot be said to have been incurred in the production of the income for the year in question. They include contributions to pensions and provident funds, which are long-term matters and certainly not related to the production of income in any one year. They include also various kinds of capital expenditure, including that for scientific research with which we are concerned. Such expenditure might or might not produce income in the year in which it is incurred, but it would be most likely to produce benefits in future years. All these matters dealt with in sub-s. (2) seem to me entirely different from the expenditure dealt with in sub-s. (1). Then there is s. 15 (1).

This is the negative sub-section, which provides that no deduction is to be allowed which was not incurred in the production of income or which is of a capital nature, but this sub-section is expressly made subject to s. 14 (2). It seems to me quite clear from these provisions that the classes of expenditure referred to in s. 14 (2) are exceptions to the general rules set out in s. 15 (1).

I think, therefore, with great respect, that the learned judge was wrong in law on both grounds on which he allowed the appeal to the High Court. Unfortunately, that does not dispose of the matter, and we are at the disadvantage that we do not have the benefit of the opinions of the learned judge on the other questions that arise. We considered whether we should remit the proceedings but we were reluctant to do so because of the delay and expense it would involve. The only evidence before the High Court was an agreed bundle of letters and other documents and we are therefore in as good a position as was that court to evaluate it.

Mr. Hewett argued at some length that the K.M.C.'s contribution to the Kenya National Fund was not a gift but a payment made for consideration. With respect, I do not think it necessary to decide that question, because it seems to me irrelevant to this appeal. What concerns us is merely whether it was "expenditure" of a kind which is deductible from income within the provisions of ss. 14 and 15 of the Act.

The real issue in this appeal appears to me to be whether the contribution can properly be said to have been "for the purposes of a trade carried on" by the K.M.C. and it was to this question that Mr. Muli, who appeared for the Commissioner, directed most of his argument in resisting the appeal. Briefly, Mr. Muli's argument was that s. 14 (2) (*p*) of the Act must be read as requiring the expenditure to have been directly and exclusively for the purposes of the taxpayer's trade. He submitted that the true facts here were that the K.M.C. made a contribution to the Kenya National Fund in response to a national appeal; that the contributions was to be used for research which would benefit the nation and its people; and that any benefit which the K.M.C. would receive would be incidental and indirect.

There is much force in these arguments and it is only after considerable hesitation that I have rejected them. If the contribution had been given, say, for research in animal husbandry generally, I might well have agreed with Mr. Muli, but examination of the correspondence shows that the K.M.C. took care to ensure that none of the money was spent for any purpose that would not be to its benefit. For example, one project was rejected because, although it was for the good of the cattle industry, it would benefit the dairy industry rather than the meat industry. A letter from the Director of Veterinary Services speaks of the need for research into the causes of death among cattle and sheep resulting in "declining numbers of the National herds and flocks." The main functions of the K.M.C. are the slaughter of cattle and sheep and the storage, canning and sale of beef and mutton, and it is obvious therefore that it has a direct interest in the available supply of beasts. It is true, as Mr. Muli said, that it is the producers who would benefit in the first instance from the results of research, but that does not mean that the K.M.C. does not have a direct interest in it. Section 14 (7) (*c*) of the Act defines "scientific research for the purpose of a trade" as including:

- "(i) any scientific research which may lead to, or facilitate, an extension of such trade or, as the case may be, of trades of that class."

It seems to me that the research which the Director of Veterinary Services undertook was unquestionably research which might lead to an extension of the K.M.C.'s business.

There are two other questions that require to be answered. The first is whether it made any difference that the payment was made in the first instance to the Kenya National Fund and not the Director of Veterinary Services. I understood Mr. Muli to concede that this was immaterial and I think he was right to do so, because, apart from deciding that the conditional contribution was one which it could accept as being in the national interest, the Kenya National Fund played no real part except that of an intermediary. The second is whether the contribution was any less expenditure for research because it was also a contribution to a nation-building fund. I cannot see that this makes any difference. The money was to be spent wholly in research and that research was wholly to be directed to ends which would directly benefit the K.M.C.'s business. That, I think, makes the expenditure a permitted deduction under the Act and, if so, it is immaterial that the manner of the expenditure was such as to make it appear a patriotic gesture. It is true that the Kenya National Fund could not under its Trust Deed accept a contribution for a specified purpose which was not in the opinion of the trustees for the national benefit but it seems to me possible for a project to be both for the benefit of an individual or corporation and for the national benefit.

I would allow the appeal, set aside the judgment and decree of the High Court and substitute an order that Assessment No. 53/9815 for the year of income 1963 be amended by allowing a deduction of Shs. 200,000/- in respect of the contribution made to the Kenya National Fund by the K.M.C. I would allow the K.M.C. the costs of the appeal and its costs in the High Court.

Sir Clement De Lestang V-P: I have had the advantage of reading in draft the judgment of Spry, J.A., and while I entirely agree with the first part of his judgment, that the grounds upon which the decision of the court below are founded are erroneous, I have had serious doubts on the question whether the contribution made by the taxpayer to the Kenya National Fund for use on scientific research in the beef and mutton industry, was incurred for the purpose of the taxpayer's trade so as to qualify as a deductible expenditure. It is not really contested that the kind of research to which the money was allocated would, if successful, benefit the taxpayer's trade although such benefit is not likely to be immediate and will not be confined to the taxpayer. It is also no longer contended, and rightly so in my view, that the deduction does not depend on the expenditure on scientific research being undertaken directly by the taxpayer. What has worried me is the unusual way in which the expenditure was incurred. I have wondered, for example, if it would have been incurred at all if the Kenya National Fund had not been launched and I got the definite impression, rightly or wrongly, that the taxpayer has been trying to be generous at someone else's expense. Otherwise, why did it not pay the money over direct to the Director of Veterinary Services?

It would have been interesting also to know if the taxpayer had ever expended any money on scientific research before, and if so, how it went about it and, if it departed from past practice, why it did so. All this has caused me to wonder whether this expenditure was incurred for the bona fide purposes of the taxpayer's trade. I realise, of course, that so long as the expenditure is incurred on scientific research for the purposes of the trade as defined by the East African Income Tax (Management) Act 1958, the taxpayer's motive is quite irrelevant and I cannot say with certainty that it has not been so incurred, especially as my brothers think that it has. So, although I entertain doubts I do not feel justified in differing from the conclusion to which they have come. The appeal is accordingly allowed and there will be an order in the terms proposed by Spry, J.A.

Law JA: I have had the advantage of reading in draft the judgment prepared by Spry, J.A. with which I am in general agreement. The one point

which has caused me real difficulty in this appeal is whether or not the Kenya Meat Commission's donation of Shs. 200,000/- to the Kenya National Fund can be looked upon as coming within s. 14 (2) (p) of the East African Income Tax (Management) Act 1958, which allows, as a permitted deduction:

“any expenditure of a capital nature incurred by any person on scientific research for any purposes of a trade carried on by him.”

The expenditure in this case was primarily a donation to the National Fund, given in response to appeals for contributions made by the Government. The donation however was made subject to the express condition that it be used solely for research which would benefit the Kenya beef and mutton industry, and it was accepted by the trustees of the National Fund on that understanding. The appellant has a statutory monopoly in the meat trade so far as beef and mutton are concerned. A scheme was drawn up by the Director of Veterinary Services, strictly limited to research for the benefit of the nation's cattle and sheep industry. This scheme was approved by the appellant; the donation was passed on by the trustees of the National Fund to the Director of Veterinary Services to be applied for the purposes of that scheme, and the money has in fact been applied, and is being applied, for those purposes. The result of this research work should benefit the appellant's trade in the long run. It seems to me that in these circumstances the donation falls within s. 14 (2) (p) of the Act, in that it is expenditure of a capital nature, incurred by the appellant, on scientific research for the purposes of the trade carried on by the appellant. I would allow this appeal, and I concur in the order proposed by Spry, J.A.

Appeal allowed.

For the appellant:

PJS Hewett

Daly & Figgis, Nairobi

For the respondent:

M Muli (Deputy Counsel to the East African Community)

The Counsel to the East African Community

D'Silva v Rahimtulla and others [1968] 1 EA 287 (CAE)

Division:	Court of Appeal for East Africa at Nairobi
Date of judgment:	10 April 1968
Case Number:	38/1967 (62/68)
Before:	Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Mosdell, J

[1] Land Control – Recovery of money paid under void transaction – Whether claim founded on contract – Whether Limitation Act, s. 7 (K.) applied.

[2] Limitation – Part payment – Made on account of transaction avoided by Land Control Ordinance, s. 7 (K.) – Whether time extended – Whether “simple contract” – Whether Limitation Act, s. 7 (K.) applied.

[3] Statute – Construction – Decisions of English Courts – When applicable to Kenya statute.

Editor’s Summary

The appellant, in November 1957, owed a sum of money to the respondents, and charged two pieces of land in favour of the respondents as security for the debt by means of an equitable mortgage. The consent of the Land Control Board was necessary to this transaction, but was not obtained; and in consequence the equitable mortgage became void under the provisions of the Land Control Ordinance, s. 7 (3) (b). The appellant, after having paid off most of the debt, instituted proceedings in 1964 to recover his land free from encumbrance. The respondents counter-claimed for the balance of the debt, as the amount owed to them on a simple contract of loan; or alternatively, under s. 7 (3) of the Land Control Ordinance, as money paid under an agreement which had become void. The appellant contended that this counter-claim was barred by limitation, having been filed more than six years after the cause of action arose, under s. 5 (1) of the Limitation Act. The respondents, however, argued that their counter-claim was saved by s. 7 of that Act because of the part payments of the debt which had been made less than six years before. To this the appellant replied that s. 7 of the Limitation Act could not apply because it covers only claims arising on simple contracts and does not cover causes of action created by statute. The judge below allowed the counter-claim on the ground that it was founded on a simple contract and therefore saved by s. 7; and against this decision the appellant appealed.

Held –

(a) (per Newbold, P. and de Lestang, V.-P.):

- (i) where a transaction made void by the Land Control Ordinance is severable, then part only may be avoided; and in the present case the loan was severable from the security which was made void, leaving the respondents entitled to recover at common law apart from the Act, so that their claim was not barred by limitation;
- (ii) (obiter) s. 7 of the Limitation Act is restricted to simple contracts but would have applied to the respondents’ claim because the Land Control Ordinance had made the claim one upon a simple contract; therefore the claim would not have been barred by limitation for that reason also.

(b) (per Law, J.A.):

section 7 of the Limitation Act applies to part payments made on a claim avoided by s. 7 of the Land Control Ordinance.

Appeal and cross-appeal dismissed with costs certified for two advocates. (Decree of court below varied in one respect.)

Cases referred to in judgment:

- (1) *Francis Xavier D'Silva v. Abduilah and Others*, Civil Appeal No. 63 of 1965 (unreported).
- (2) *Chemelil Sisal Estate Ltd. v. Makongi Ltd.*, [1967] E.A. 166.
- (3) *National and Grindlays Bank Ltd. v. Dharamshi Vallabhji and Others*, [1966] E.A. 186.

April 10, 1968. The following considered judgments were read:

Judgment

Sir Clement De Lestang V-P: It appears from two documents entitled "Instructions for a memorandum of equitable mortgage" and "Memorandum of equitable mortgage by deposit of documents" both dated November 7, 1957, that the appellant was indebted on that day to the respondents in the sum of Shs. 265,000/- and as security for the debt purported to charge two pieces of land to which the Land Control Ordinance (Cap. 150 of the 1948 Revised Edition of the Laws of Kenya, hereinafter referred to as the Land Control Ordinance) applied. This debt has been referred to throughout these proceedings as a loan and I shall call it so in this judgment. The equitable mortgage became void on March 7, 1958, under s. 7 (3) (b) of the Land Control Ordinance. This section reads:

"7.(1) No person shall, except with the consent in writing of the Board in the exercise of its powers under sub-s. (1) of s. 8 of this Ordinance –

- (a) sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of a like nature to the foregoing or not, alienate, encumber, charge or part with the possession of any land, or any right, title or interest, whether vested or contingent, in or over any land to any other person;
- (b) acquire any right, title or interest in or over any land for or on behalf of any person or of any company registered under the Companies Ordinance 1933;

.....
(3) Every agreement for sale, lease, mortgage or for any other transaction referred to in sub-s. (1) of this section shall be reduced into writing and every such agreement shall be void for all purposes –

- (a) if the Board refuses its consent thereto, as from the date of such refusal;
or –
- (b) if the Board has not signified its consent thereto within a period of four months from the date of the agreement, as from the expiration of that period;

and, if any money has been paid under any agreement which becomes void as aforesaid, such money shall be recoverable as a civil debt from the party to whom it has been paid."

In 1964 the appellant instituted a suit in the High Court to recover the land free from encumbrance and the respondents by their defence filed on November 17, 1964, counter-claimed for the recovery of Shs. 56,444/89 being the balance remaining unpaid on the loan. It is not in dispute that this sum has not been repaid.

Except as regards the proper order to be made on the appellant's claim, to which I shall refer later, we are only concerned here with the counter-claim.

The counter-claim is founded either on the basis of a claim at common law for the balance remaining due and owing on a simple contract of loan or alternatively under s. 7 (3) of the Land Control Ordinance for the recovery of money paid under an agreement which became void under that section.

It is common ground that in either case the repayment became due on March 7, 1958, and as the counter-claim was filed on November 17, 1964, the question which the court had to decide was whether or not the claim, on whatever foundation it rested, was barred by limitation. The period of limitation for “suits founded upon any simple contract and all personal suits whatsoever” is six years (s. 5 (1) of the Limitation Ordinance, 1948 Edn.). The present suit, whatever else it may be, is admittedly a personal suit and was accordingly barred by limitation unless saved by s. 7 of the Limitation Ordinance by reason of part payments made by the appellant during the intervening period, the last of which having been made on January 15, 1962. There is no dispute that if this section applies to either aspect of the counter-claim it is not barred.

It was the appellant’s case, however, that the respondents’ only cause of action was that given by the statute and that s. 7 of the Limitation Ordinance does not apply to such a cause of action as, so the argument goes, it is limited to claims arising out of simple contracts.

Although it is difficult to understand the learned judge’s references in his judgment to “an implied promise to repay the loan” when dealing with the counter-claim yet he seems to have held that whatever was avoided by s. 7 (3) of the Land Control Ordinance was the security and not the loan itself which stood and that whether the claim be founded on the loan or on the statute it is a claim on a simple contract and consequently not time-barred.

Against this decision the appellant appeals and the respondents cross-appeal for the purpose of sustaining the judgment on grounds other than those relied upon by the court below.

As I understood learned advocates’ arguments it is accepted on both sides that if what is avoided is only the security, leaving the loan unaffected, then the counter-claim was not barred. It is necessary, therefore, to consider what is avoided by s. 7 (3) of the Land Control Ordinance. This section has already been set out in full and it says in terms that it is “every agreement for sale, loan, mortgage, etc.” which is avoided “for all purposes”. Mr. Mackie-Robertson contended that it is not the document recording the agreement which is avoided but the particular transaction referred to in the section. I unhesitatingly agree with the first part of his contention and Mr. Nazareth has not sought to argue the contrary. This is also the view taken by Spry, J.A. in *Francis Xavier D’Silva v. Abdullah and Others*, Civil Appeal No. 63 of 1965 (unreported) where he said:

“... the word ‘agreement’ as used in sub-s. (3) did not relate to a document embodying an agreement but to the fact of agreement itself.”

The second part of Mr. Mackie-Robertson’s contention has the support of the decision in *Chemelil Sisal Estate Ltd. v. Makongi Ltd.*, [1967] E.A. 166, a case under the Land Control Regulations 1961, reg. 9 of which is substantially the same as, though not identical with, s. 7 of the Land Control Ordinance. Regarding reg. 9 (3), which corresponds to s. 7 (3) of the Ordinance, Sir Charles Newbold, P., said (*ibid.* at p. 170):

“... that regulation only makes void a dealing with, or an agreement to deal with, land to which the Regulations apply. In the case of an agreement the only thing which becomes void is the agreement in so far as it relates to dealings with agricultural land in a declared area. In other words, if in the same agreement two separate properties are leased, one being

agricultural land in a declared area and the other land elsewhere, the agreement remains perfectly valid in respect of the other land and reg. 9 (3) would apply only to payments made in respect of the agricultural land in the declared area. Equally, it is only payments made in the course of dealing with such land that are recoverable . . .”

In the *Chemelil* case (*supra*) the court found that there was no agreement but a dealing in both controlled and uncontrolled land and held that while the dealing in controlled land was avoided that in uncontrolled land was not although they appear to have formed part of a composite transaction. There can be no logical reason for treating agreements differently from dealings and the same principle must apply to both. It is, however, implicit in the majority decision in the *Chemelil* case that the dealings in two types of land were severable, the consideration being different in each case. On the authority of that case which is binding on this court and which has not been challenged, I must uphold the second part of Mr. Mackie-Robertson’s contention also subject, however, to the qualification that only a transaction severable from the one avoided remains unaffected. If it is not severable the whole transaction will be void. Applying this test to the facts of this case it seems clear to me that the loan is severable from the security. A glance at the statement accompanying the “Instructions for a memorandum of equitable mortgage” explaining how the amount of the loan is arrived at, suffices to show that the whole of the loan was made and that the debt existed before the agreement of November 7, 1957. That being so, the learned trial judge was right in my view in holding that what s. 7 (3) avoided for all purposes was the security and not the loan in the present case and that the respondents were entitled to recover what remained unpaid under the agreement of loan at common law and not under the right conferred by the statute.

Having reached this conclusion it is unnecessary to consider whether the alternative claim under the section was barred by limitation, but as we have heard extensive arguments on this point and it is the subject of the cross-appeal I propose to express my views briefly.

It is, it will be recalled, conceded that the period of limitation for a claim under the section is six years under s. 5 of the Limitation Ordinance and that consequently the claim in the present case is barred unless it is saved by s. 7 of the Limitation Ordinance by the part payments which were made within six years of the filing of the counter-claim. The answer to this question depends on the true construction of the section, the relevant portion of which reads thus:

“If any acknowledgment shall be made either by writing by the party liable upon any simple contract, or his agent, or by part payment or part satisfaction on account of any principal or interest being due thereon, it shall and may be lawful for the person entitled to bring such suit to bring his suit for the money remaining unpaid or so acknowledged to be due, within six years after such acknowledgments, or part payment, or part satisfaction, as aforesaid, or the last of such acknowledgments, part payments or part satisfactions, if more than one . . .”

It was contended by Mr. Nazareth that s. 7 does not apply to a statutory claim for two reasons. Firstly, because the section, on its proper construction, is limited to claims arising upon simple contracts, and, secondly, because the Limitation Ordinance is taken from the English law of limitation and should accordingly be interpreted in accordance with English decisions at the time of the passing of the Ordinance which he submitted was to the effect that only simple contracts could be saved by acknowledgments. He submitted that the section specifically deals with “any acknowledgment of liability upon any simple contract” and that “part payment and part satisfaction on account of

any principal or interest being due thereon” are merely forms of such acknowledgment and therefore do not extend the scope of the section to claims other than those based on simple contracts. He further argued that the word “thereon” refers to simple contract thus removing any doubt on the matter.

Mr. Mackie-Robertson, on the other hand, contended that the section deals with two types of claims, namely, those founded on simple contracts and those founded on debts howsoever they have arisen. He argued that if it were intended to apply only to debts arising out of a simple contract the word “thereunder” and not “thereon” would have been used. He submitted that “thereon” related to “principal” and not to “simple contract”.

Regarding the application of English decisions in construing the section, this aid to construction is a limited one and applies only where the Act to be construed is identical or at least substantially the same as that from which it is derived. This is far from being the case here. In any event, as the Judicial Committee of the Privy Council said in *National and Grindlays Bank Ltd. v. Dharamshi Vallabhji and Others*, [1966] E.A. 186, it is unsafe to assume that when an Act is modelled on another Act the legislature must necessarily be supposed to have intended to import into that Act the case-law of the country from which it is derived. I do not think that this method of construction should be used in the present case but rather that the section should be interpreted, as statutes usually are, free from outside influence. On a literal construction of this section I think that Mr. Nazareth’s submission that part payment and part satisfaction are merely modes of acknowledgment is clearly right. This supports his main contention to some extent. As regards the word “thereon”, I think that, generally speaking, in the expression “principal or interest being due thereon” taken on its own, that word relates clearly to “principal” but it does not necessarily do so when the expression is part of a wider context. In the context in which this word appears in the section under consideration it may well relate to “simple contract” and not to “principal” for two reasons. First, it will be noted that the legislature used the preposition “upon” instead of “under” when referring to “simple contract”; this explains the subsequent use of the word “thereon” instead of “thereunder” for the same purpose. Secondly, unless “thereon” relates to “simple contract” the relevant part of the section would read thus:

“If any acknowledgment shall be made either by writing by a party liable upon any simple contract . . . or by part payment or part satisfaction on account of any principal . . .”

But a “principal” of what? The only logical answer is that it is the principal upon any simple contract.

I have not found this section easy to construe but after much thought, and with some hesitation, have come to the conclusion that it is restricted to simple contracts.

This is not, however, the end of the matter. A claim under s. 7 of the Land Control Ordinance is clearly a statutory claim and it was so decided in the *Chemelil* case, [1967] E.A. 166. A statutory claim does not, of course, arise out of contract unless the statute which creates it otherwise provides. In my view the statute has provided otherwise in the present case.

Section 7 (3) of the Land Control Ordinance provides that “such money shall be recoverable as a civil debt from the party to whom it has been paid”. Mr. Nazareth contended that those words were merely intended to apply the same procedure to a suit under the statute as in cases of debt, while Mr. Mackie-Robertson argued that they had the effect of clothing the cause of action with

all the legal characteristics of one for a civil debt. I prefer Mr. Mackie-Robertson's interpretation. In my view "recovered as a civil debt" does not mean in the manner or mode in which a civil debt is recovered but rather as if it were a civil debt which it is not. In other words, the claim under the section is assimilated in all respects to a civil debt. But what is a civil debt? A civil debt is not a term of art. It implies a debt which can be recovered in the civil courts. As most of such debts arise out of simple contracts it seems to me that what the legislature intended was that claims under the section should be recovered as claims of debt under simple contracts. That being so, the claim, in so far as it was founded on the section, was likewise not barred by limitation.

In the result, both the appeal and the cross-appeal fail.

During the hearing of the appeal Mr. Nazareth applied for the order of the court below to be varied in one respect. At the trial issues were framed and the appropriate orders also agreed upon. One of these orders was incorporated in the decree as order (3) and reads as follows:

"That the defendants do execute and deliver to the plaintiff a discharge of the equitable mortgage or mortgages dated 7th day of November, 1957, relating to Plots Land Reference Nos. 336/5 and 336/10, if such document is required by the Registrar of Titles, Nairobi, on payment to them of the said sum and interest."

As the equitable mortgage or mortgages was, or were, null and void, this order is inappropriate and Mr. Nazareth asked that a declaration that the mortgage or mortgages was, or were, null and void be substituted for it. Mr. Mackie-Robertson raised no objection provided the variation did not entail an order for costs against the respondents. We think that Mr. Nazareth's application should be granted but that there should be no order as to costs. I would accordingly dismiss both the appeal and the cross-appeal with costs and vary the decree by deleting order 3 therefrom and inserting therein a declaration that the said equitable mortgage or mortgages dated or made about the 7th day of November, 1957, are null and void. I would give a certificate for two advocates.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Sir Clement de Lestang, V.-P., and I agree with it. There will be an order in the terms proposed by him.

Law JA: This appeal arises out of a suit filed by the appellant who on November 7, 1957, was advanced the sum of Shs. 265,000/- by the respondents. This advance was secured by a memorandum of equitable mortgage by deposit of documents executed by the parties, whereby the appellant charged two pieces of land in favour of the respondents. The consent of the Land Control Board, required by s. 7 (1) (3) of the Land Control Ordinance (Cap. 150), was never sought or obtained in respect of this transaction by either party, and it is common ground that the agreement for an equitable mortgage became void "for all purposes" for want of consent four months after the date of its execution, that is to say on March 7, 1958. The appellant has, over the years, made substantial repayments in reduction of the sum advanced to him, the last such repayment being made on January 15, 1962. By his plaint, filed on June 19, 1964, the appellant claimed *inter alia* for a declaration that the equitable mortgages were null and void, and by their defence dated November 17, 1964, as subsequently amended, the respondents counter-claimed the sum of Shs. 56,444/89, being the balance of the original advance outstanding and owing at that date, both as an ordinary common law claim for the balance of a debt due under a simple contract and "also and alternatively" as a civil debt under s. 7 (1) (3) of the Land Control Ordinance, which provides that money paid in respect of

a transaction which is void for want of consent shall be recoverable “as a civil debt”. By his reply, the appellant averred that the counter-claim was barred by limitation under s. 5 (1) of the Limitation Act, (Cap. 11, Kenya Laws 1948, Rev. Edn.), which provides that all suits for the recovery of any chattel, or founded upon a simple contract, and all personal suits, shall be commenced within six years after the cause of action arose. By their rejoinder the respondents relied upon s. 7 of the Limitation Act as extending the period of limitation. So far as it is material, that section reads:

“If any acknowledgment shall be made either by writing by the party liable upon any simple contract, or his agent, or by part payment or part satisfaction on account of any principal or interest being due thereon, it shall and may be lawful for the person entitled to bring such suit to bring his suit for the money remaining unpaid or so acknowledged to be due, within six years after such acknowledgment, or part payment, or part satisfaction, as aforesaid, or the last of such acknowledgments, part payments or part satisfactions, if more than one . . .”

Subject to consideration of the proper form of order to be made in respect of the mortgages, this appeal only concerns the counter-claim. The learned trial judge found in favour of the respondents on the counter-claim on two grounds. First, he held that although the equitable mortgages became void, an implied promise to repay the loan remained. In the words of the trial judge “I apprehend that an implied promise to repay the loan still stood. The security only had gone”. Secondly, he held that if the cause of action on which the counter-claim was based was the right given by s. 7 (1) (3) of the Land Control Ordinance, to recover moneys paid under an agreement which has become void, “as a civil debt”, this statutory cause of action was, in the circumstances of this case, analogous to a claim on a simple contract, so that s. 7 of the Limitation Act applied, by reason of the part payments made after the cause of action arose.

The memorandum of appeal is directed against both these findings, and a cross-appeal has been filed, in which it is submitted that even if the counter-claim was a cause of action not founded on a simple contract, the part payments made by the appellant kept the cause of action alive, since part payments under s. 7 of the Limitation Act are not confined to simple contracts.

Mr. Nazareth for the appellants submitted that sub-s. (3) of s. 7 of the Land Control Ordinance is explicit where consent to a transaction of mortgage is not obtained; the agreement for that mortgage is void for all purposes, so that no suit can be based on the agreement for the return of the money advanced under that agreement, which advance the mortgage was intended to secure. The only remedy open to the person who advanced the money is the right conferred by that subsection to recover the money “as a civil debt from the party to whom it has been paid”. Such a right conferred by legislation in similar terms was held in *Chemelil Sisal Estate Ltd. v. Makongi Ltd.*, [1967] E.A. 166, to create a statutory cause of action. The counter-claim was filed more than six years after the statutory cause of action arose in the case now under consideration. Mr. Nazareth submitted that s. 7 of the Limitation Act only applies to liability under a simple contract, which expression involves a promise to pay founded on the consent of the parties, and he argued that a statutory cause of action, being an obligation imposed by statute, excludes the notion of a promise based upon consent, so that s. 7 aforesaid cannot apply to extend limitation in a suit based on a statutory cause of action. I do not feel it necessary to decide Mr. Nazareth’s first submission, that the counter-claim could not be based on the agreement as the agreement has been declared by law to be void for all purposes, because in my considered opinion this appeal fails in so far as Mr. Nazareth’s second submission is concerned. The object of s. 7 of the Land

Control Ordinance is, as Sir Charles Newbold, P., said in the *Chemelil* case in respect of similar legislation ([1967] E.A. at p. 171):

“to prevent an interest in land being acquired without the requisite consent and as far as possible to restore the parties to the status quo.”

If the right of action conferred by s. 7 of the Land Control Ordinance was barred by limitation after six years, and this period could not be extended by reason of part payments made by the debtor, the creditor would be in a less favourable position than if his cause of action under the void agreement had been preserved, and the status quo would not have been restored. This cannot have been the intention of the legislature. Section 7 aforesaid is not punitive in purpose: see the *Chemelil* case, *ibid.* at p. 171. A broad, realistic view must be taken of the circumstances as a whole. Such a view leads me to the conclusion that the right of action conferred by s. 7 to recover moneys paid under a void agreement “as a civil debt” includes the notion of a civil debt of the nature of the debt existing in terms of the void agreement, that is to say a debt arising out of a simple contract. The creditor is not being given a new right of a different character, such as the right to sue for a penalty, but his right to recover money paid under an agreement which has become void by operation of law is recognized. In my opinion, s. 7 of the Limitation Act applies to extend time in a suit to recover money paid under an agreement rendered void by s. 7 of the Land Control Ordinance, where part payments have been made by the person to whom the money was paid, and time for the purpose of limitation runs from the date of the last such part payment.

As regards the cross-appeal, Mr. Mackie-Robertson for the respondent submitted that s. 7 of the Limitation Act is not confined to simple contracts, but that it should be construed disjunctively so far as the sentence relating to part payment and part satisfaction is concerned. In other words, time is extended:

- (a) if an acknowledgment shall be made either by writing signed by the party liable upon any simple contract, or his agent, or
- (b) by part payment or part satisfaction on account of any principal or interest being due thereon.

Mr. Nazareth argued that the word “thereon” at the end of para. (b) above related back to the words “any simple contract” in para. (a), but in my view the words “interest being due thereon” clearly relate to the words “any principal”, and I cannot see why part payment or part satisfaction on account of a principal sum should be confined for the purpose of extending limitation to a principal sum due under a simple contract, and should not apply to a principal sum due, for instance, under a deed, or recoverable under a statutory cause of action, other than a penalty.

For these reasons I would dismiss this appeal and allow the cross-appeal. As regards the form of order in respect of the voided mortgages, I agree with the order proposed by the Vice-President.

Order accordingly.

For the appellant:

JM Nazareth, QC and US Kalsi

US Kalsi, Nairobi

For the respondents:

JA Mackie-Robertson, QC and AE Hunter

Daly & Figgis, Nairobi

Kayanja v New India Assurance Company Ltd
[1968] 1 EA 295 (CAK)

Division: Court of Appeal at Kampala
Date of judgment: 17 April 1968
Case Number: 59/1967 (63/68)
Before: Sir Charles Newbold P, Duffus and Spry JJA
Sourced by: LawAfrica
Appeal from: High Court of Uganda – Mead, J

[1] *Contract – Third party – Rights of – Whether stranger to a contract can sue on it – Effect of statute – Compulsory third party motor insurance.*

[2] *Insurance – Motor Insurance – “Authorised driver” – Whether authorised driver can sue insurance company direct – Traffic Act, s. 104 (U.).*

[3] *Insurance – Motor Insurance – Third party risks – Compulsory third party insurance – Whether person injured by “authorised driver” can enforce judgment against insurance company – Traffic Act, s. 104 (U.).*

Editor’s Summary

The appellant was injured by a motor car owned by H but driven at the time by B. He sued B and got judgment against him for damages. H had a policy of insurance with the respondent insurance company, under the terms of which the respondent was to indemnify H against sums which H would become liable to pay to third parties for injuries arising from the use of the motor car. B was not named in the policy; but by its terms the respondent had agreed also to indemnify (subject to certain conditions) “any authorised driver”. B was an authorised driver within the policy. The judgment against B not having been satisfied, the appellant brought suit against the respondent under s. 104 of the Traffic Act, praying for a declaration that, under that section, the respondent was bound to satisfy the judgment. The trial judge dismissed the suit on the ground that B was not “a person insured by the policy” within s. 104 (1). The appellant appealed.

Held –

- (i) a stranger to a contract cannot sue upon the contract unless given a statutory right to do so (*Halal Shipping Company v. Securities Bremmer* (2) followed);
- (ii) (obiter) where, as here, the liability covered by an insurance is one which is required by the Traffic Act to be covered then an “authorised driver” has a statutory right to sue the insurance company himself to enforce an indemnity given to him by the policy (*Union Assurance Society Limited v. Ainscow* (3) distinguished);
- (iii) an “authorised driver” to whom an indemnity is given under the terms of a policy effected by

another person is “a person insured by the policy” within the meaning of s. 104 (1) of the Traffic Act (*Vandepitte v. Preferred Accident Insurance Corporation* (4) distinguished, principle in *New Great Insurance Company of India Limited v. Cross* (1) applied);

- (iv) therefore the insurance company in such circumstances is under a duty to satisfy a judgment obtained against such an “authorised driver”.

Appeal allowed. Declaration granted. Costs to the appellant.

Cases referred to in judgment:

- (1) *New Great Insurance Company of India Ltd. v. Cross*, [1966] E.A. 90.
- (2) *Halal Shipping Company v. Securities Bremmer*, [1965] E.A. 690.
- (3) *Union Assurance Society Ltd. v. Ainscow*, [1961] E.A. 257.
- (4) *Vandepitte v. Preferred Accident Insurance Corporation*, [1932] All E.R. Rep. 527.

(5) *Nayar v. Sterling Insurance Company*, [1966] E.A. 144.

(6) *Beswick v. Beswick*, [1967] 2 All E.R. 1197.

April 17, 1968. The following considered judgments were read.

Judgment

Sir Charles Newbold P: The appellant was injured by a motor car owned by a Mr. Hodges but driven by a Mr. Bikaju with the authority of Mr. Hodges. The appellant obtained judgment for the sum of Shs. 87,000/- and costs against Mr. Bikaju in respect of his injuries. At the time of the accident Mr. Hodges was insured with the respondent insurance company. Under the terms of the policy the insurance company were to indemnify Mr. Hodges against sums he would be liable to pay in respect of injuries to third parties (with certain irrelevant exceptions) arising from the use of his motor car. The policy contained a similar indemnity to any authorised driver, subject to certain conditions which have been satisfied. The judgment obtained by the appellant against Mr. Bikaju was not satisfied so the appellant sued the insurance company praying for a declaration “that James Bikaju was an authorised driver at the time of the accident and the defendant (that is the insurance company) is bound to satisfy the judgment and decree in High Court Civil Suit No. 873 of 1964 obtained by (the appellant) against James Bikaju”.

At the trial three issues were framed. The first was whether Mr. Bikaju was an authorised driver within the meaning of the insurance policy issued to Mr. Hodges. The trial judge found that he was, and there has been no appeal against that finding. The second was whether the judgment had been obtained against any person insured by the policy within the meaning of s. 104 (1) of the Traffic Act (Cap. 342). The trial judge held that no such judgment had been obtained, and it is this decision which is the subject of this appeal. The third was whether the appellant had given a sufficient and valid notice as required by s. 104 (2) (a) of the Traffic Act. The trial judge found that such a notice had been given, and there has been no appeal against that finding.

Subject to one matter to which I shall refer later, the main question on this appeal is whether the judgment obtained by the appellant against Mr. Bikaju, who was driving the car with Mr. Hodges’ authority, was a judgment against a person insured by the policy issued by the insurance company to Mr. Hodges within the meaning of s. 104 (1) of the Traffic Act. If it was, then the appellant is entitled to obtain a declaration and the appeal succeeds.

Section 98 of the Traffic Act provides that it is unlawful for any person to use or permit another person to use a motor vehicle on the road unless there is in force in relation to the user by that person or that other person such a policy of insurance in respect of third party risks as is required by the Act. That section, together with the other sections to which I shall refer, come within a Part of the Act dealing with “Compulsory insurance of motor vehicles”; and the side-note to that section reads “Motor vehicles to be insured against third party risks”. Section 99 provides, subject to certain irrelevant exceptions, that in order to comply with s. 98 a policy of insurance must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person arising out of the use of the motor vehicle on a road. It is to be noted that the section uses the word “insures” in relation to “classes of persons”. Classes of persons cannot be a contracting party, so the word “insures” is used in relation to persons covered by an insurance policy to which they are not a contracting party. Section 101 provides that a certificate of

insurance shall be issued by the insurer to the person by whom the policy of insurance is effected and s. 102 provides that any condition in the policy of

insurance avoiding liability in respect of such liabilities as are required to be covered by a policy under s. 99 shall be of no effect. Section 103 requires the driver of the motor vehicle in certain circumstances to produce "his certificate of insurance". It is clear that phrase includes the certificate of insurance of a car which covers an authorised driver even though the driver may not himself have entered into the contract of insurance.

Section 104 then provides that where judgment in respect of a liability required to be covered by a policy under s. 99 and in fact so covered by the policy "is obtained against any person insured by the policy" then the insurer shall, subject to conditions which have been satisfied in this appeal, pay to the persons entitled to the benefit of the judgment the amount thereof, together with the costs and interest referred to in that section.

The main issue in this appeal is whether the judgment obtained against Mr. Bikaju is a judgment "obtained against any person insured by the policy" issued to Mr. Hodges. In effect this also poses the question whether s. 104 has given to a stranger to a contract the right to sue a contracting party in order to enforce a provision of the contract which is in his favour. I said in *New Great Insurance Company of India Ltd. v. Cross*, [1966] E.A. 90, when dealing with the provisions of a Kenya Act whose provisions are almost identical with those of the Uganda law now under consideration (*ibid.* at p. 95):

"The obvious intention of the Act, as ascertained both from the preamble and from its provisions, is to enable third parties who have received injury from the use of a motor vehicle on the road to recover compensation for the injury even if the person who inflicted it is not in a position to pay any compensation so awarded. It is against that background that each of the provisions of the Act must be interpreted."

I consider that these remarks are equally apposite in this case.

Before dealing with the main issue, I wish to deal with another issue which was raised by Mr. Sebalu for the appellant. It was urged that having regard to the wide definition of consideration in the Indian Contract Act, which applied in Uganda at the relevant time, a stranger to a contract could sue a contracting party and take advantage of the provisions of the contract, irrespective of any statutory right of action given by s. 104. In this case it was submitted that under the contract between Mr. Hodges and the insurance company there was provision whereby the insurance company undertook to indemnify an authorised driver against any sums which the authorised driver was liable to pay arising out of an accident when driving the vehicle the subject of the insurance, and that as the appellant had recovered damages against an authorised driver therefore the appellant could sue the insurance company and take advantage of the provisions of the contract in the appellant's favour. The trial judge rejected this submission and held that, subject to exceptions of which this was not one, only parties to a contract can sue upon it. The same argument was addressed to Chanan Singh, J. in the Kenya case of *Nayar v. Sterling Insurance Company*, [1966] E.A. 144, and rejected by him. In England the position has recently been considered by the House of Lords in the case of *Beswick v. Beswick*, [1967] 2 All E.R. 1197, and the principle that only parties to a contract can sue on the contract again confirmed. It is of interest that the judgments in the *Beswick* case confirmed, as far as England is concerned, the views of Chanan Singh, J., that the party to the contract can either himself sue for the breach (though in such a case the damages to which he would be entitled is the loss suffered by himself and not by anyone else) or in certain circumstances as the trustee for the person for whose benefit the provisions were inserted (in which case the damages might well be the loss suffered by that person or there might be an order for specific performance). As far as East

Africa is concerned, however, I consider that the principle has already been decided by this Court in *Halal Shipping Company v. Securities Bremmer*, [1965] E.A. 690, an appeal from Aden, where it was clearly stated that a stranger to a contract cannot sue on it. It is true that the definition of consideration in the Aden Contract Act is not the same as in the Indian Contract Act, but the reasons for the decision were put upon wide terms of principle and I see no reason at all to impugn the decision in that case. Unless, therefore, the appellant has been given a statutory right to sue the insurance company I consider that it is not open to him in his own name to do so. This is the effect of the decision in *Union Assurance Society Ltd. v. Ainscow*, [1961] E.A. 257, in which this court held that an authorised driver could not sue the insurance company directly because a section in the Kenya legislation identical with s. 104 did not, in the circumstances of the case, give to the authorised driver such a right. Those circumstances were that the liability covered by the insurance was not one required to be covered by the Kenya section which is the equivalent of s. 99 (b). In this appeal, however, the liability is one required to be so covered. Mr. Salter submitted that in any event s. 104 (1) did not give a right of action to the authorised driver as Uganda had not adopted the English sub-section, s. 206 (3) of the Road Traffic Act 1960, which gave such a right. I cannot agree. If the authorised driver is a “person insured by the policy” within the meaning of s. 104 (1) then in my view the statutory duty placed on the insurer to “pay to the persons entitled to the benefit of the judgment” the amount of the judgment carries with it a corresponding right on the part of those persons to sue if the duty is not performed. It is to be noted that nowhere in the *Ainscow* case (*supra*) is it suggested that if the circumstances of the case had been within the section nevertheless there would have been no right to sue.

I turn now to the question which is the main issue on this appeal. Is an authorised driver to whom an indemnity is given under the terms of a policy effected by another person a person “insured by the policy” within the meaning of s. 104 (1)? In my view he clearly is. The whole object of this legislation requires such a construction. In addition, as I have already pointed out, the word “insures” is used in s. 99 (b) in relation to persons who cannot be contracting parties, and the phrase “certificate of insurance”, is used in s. 103 in relation to persons who are not contracting parties. It is urged that to bring within the phrase “insured by the policy” persons who are not contracting parties would be contrary to the decision in *Vandepitte v. Preferred Accident Insurance Corporation*, [1932] All E.R. Rep. 527. I do not agree. That case was concerned with the construction of a section of an Insurance Act dealing generally with insurance and not, as in this case, with a particular type of insurance. There were other sections of the Act which required that a restricted meaning be attached to the word “insure” in the particular section which was under consideration and, as Lord Wright said when delivering the judgment of the Privy Council (*ibid.* at p. 533): “that section must be read with the relevant sections of the Act”. As I have already pointed out the reverse is the position here, as other sections of this Part of the Traffic Act require the words “person insured” to include persons other than the policy holder. There is nothing in the *Vandepitte* case which would require a restricted construction of the words “person insured”; even if there were I do not consider that a restricted construction should be adopted in relation to s. 104 (1).

In my view, therefore, Mr. Bikaju, the authorised driver, was a person insured by the policy and as the appellant has recovered judgment against Mr. Bikaju the insurance company is under a duty, on the facts of this case, to pay to the appellant the amounts mentioned in s. 104 (1). Accordingly, in my opinion, the appellant is entitled to the declaration for which he prays.

For these reasons I would allow the appeal with costs, set aside the judgment and decree of the High Court and substitute therefore a judgment and decree granting the declaration in the terms asked for in the plaint and ordering the insurance company to pay the appellant's costs of the suit. As the other members of the Court agree it is so ordered.

Duffus J A: I have had the advantage of reading the draft judgment of my Lord the President. The facts have been fully stated by the President and the main question is whether a person authorised to drive a motor car by the owner and who is indemnified by the insurance policy effected by the owner is a person insured within the meaning of s. 104 (1) of the Traffic Act (Cap. 342).

The policy of insurance in question is in evidence as Exh. A and the material portion of the policy is set out in cl. 2, s. II, Liability to Third Parties, which reads, *inter alia*:

- "2. In terms of and subject to the limitations of and for the purposes of this section the company will indemnify
 - (a) any authorised driver who is driving the motor vehicle provided that such authorised driver
 - (i) shall as though he were the insured observe fulfil and be subject to the terms of this policy insofar as they can apply."

The appellant obtained a judgment for negligence against a Mr. Bikaju for damages for his negligent driving of the motor car. The judge found Mr. Bikaju to be an authorised driver within the meaning of cl. 2 but he found that he was not a person insured by the policy within the meaning of s. 104. The learned judge held that these words only applied to the person effecting the insurance policy and did not apply to an "authorised driver".

Part IX of the Traffic Act (Cap. 342) deals with the compulsory insurance of motor vehicles. The main purpose of this legislation is to provide protection for third parties injured by the careless user of a motor vehicle. Section 98 provides that it shall be unlawful for any person to use or cause or permit any other person to use a motor vehicle on the road unless there is in force an insurance policy as required by the Act to cover risks to third parties.

Then s. 99 (b) provides that the policy must be a policy, which *inter alia*:

- "(b) insures such person, persons, or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road:"

I am clearly of the view that Mr. Bikaju, as an authorised driver under the policy was a person insured within the meaning of s. 99 (b).

To succeed against an insurance company under s. 104 a plaintiff has to prove, *inter alia*:

- (a) that a policy of an insurance has been effected in respect of a liability required to be covered by s. 99 (b) (*supra*),
- (b) that he is a person entitled to the benefit of a judgment obtained in respect of such a liability,
- (c) that the judgment was obtained against a person insured by such policy.

Mr. Bikaju was a person covered within the meaning of s. 99 (b), and one of the class of persons specifically insured by cl. 2 of s. II of the policy. This being so, it seems to me clear that he must be a person insured by this policy and that accordingly the appellant is entitled to enforce the judgment obtained against

Mr. Bikaju as against the respondent insurance company under provisions of s. 104.

I agree therefore with my Lord the President that this appeal be allowed in accordance with the order set out in his judgment.

Spry JA: I also agree.

Appeal allowed with costs. Declaration granted as prayed.

For the appellant:

LKM Sebalu

Sebalu & Co, Kampala

For the respondent:

Clive Salter, QC and BD Dholakia

Parekhji & Co, Kampala

Sebei District Administration v Gasyali and others

[1968] 1 EA 300 (HCU)

Division: High Court of Uganda at Mbale

Date of judgment: 20 March 1968

Case Number: 128/1967 (64/68)

Before: Sheridan J

Sourced by: LawAfrica

[1] Civil Practice and Procedure – Ex parte judgment – Setting aside of – Principles to be applied – Judgment entered against incorporated public authority because of default by official – Good defence to claim – Whether poverty of excuse only criterion – Whether judgment approbated – Civil Procedure Rules, O. 9, r. 9 (U.).

Editor's Summary

The respondents sued the appellant, a public authority. The summons was served on the secretary of the appellant who failed to do anything about it, so that the respondents obtained judgment *ex parte*. The appellant applied to set aside this judgment, but the trial magistrate refused to set it aside, finding that the conduct of the secretary amounted to such wilful disregard as not to deserve relief. The appellant appealed and, upon being ordered to pay the decretal amount into court, duly did so. There was also an issue as to whether the appellant had “approbated” the judgment by a letter. It was not disputed that the appellant had a defence on the merits.

Held –

- (i) a distinction is to be drawn between an individual defendant and the secretary of an incorporated body which is a defendant;
- (ii) in the circumstances the justice of the case required the defence to be heard on its merits (*Kanji Purshottam Toprani v. K. C. Patel* (1) and *Jamnadas V. Sodha v. Gordhandas Hemraj* (2) applied);
- (iii) even if the judgment had been approbated by the appellant, the court still had a discretion to set it aside.

Appeal allowed.

Cases referred to in judgment:

- (1) *Kanji Purshottam Toprani v. K. C. Patel*, [1958] E.A. 346.
- (2) *Jamnadas V. Sodha v. Gordhandas Hemraj* (1952), 7 U.L.R. 7.
- (3) *Bartlam v. Evans*, [1937] A.C. 473.

Judgment

Sheridan J: This is an appeal against an order of the chief magistrate, Mbale, dated November 21, 1966, dismissing an application to set aside an *ex parte* judgment and decree under the Civil Procedure Rules, O. 9, r. 9.

By a plaint dated February 2, 1965 the respondents sued the first defendant and the appellants for damages for assault and trespass. The first defendant was a chief employed by the appellants, the Sebei District Administration, and it was alleged that the acts complained of were committed by him in the course of his employment.

On April 7, 1965 a summons to enter an appearance within fifteen days was served on David Paulo Arapata, the appellants' administrative secretary, in accordance with s. 100 of the Local Administrations Act (Cap. 25) (since repealed by the Administrations (Districts) Act (No. 13 of 1966) and the Local Administrations Act (No. 18 of 1967)).

No appearance was entered by the appellants and on October 11, 1965 an *ex parte* judgment was entered against them under O. 9, r. 4 for Shs. 6914/-, the liquidated demand of the respondents.

On December 8, 1965 the respondents – now the judgment creditors – applied to execute the decree by attachment of the appellants' property. On December 18, 1965 the appellants applied to set aside the *ex parte* judgment. There were several hearings and delays before the learned magistrate made his order – it is incorrectly intituled a ruling – on November 21, 1966.

On November 24, 1966 an application for leave to appeal was made. On January 19, 1967 this was granted by the then acting chief magistrate. He ordered the decretal amount to be deposited in court. This has been done.

In support of the application to set aside the *ex parte* judgment, Mr. Arapata swore an affidavit in which he averred in para. 7:

“That the failure to enter appearance on behalf of the second defendant was grave slip on my part due to pressure of work and I verily believe that a public body be not penalized for my mistake and be given leave to defend a first cause.”

Here I think a distinction is to be drawn between an individual defendant who fails to enter an appearance and a secretary of an incorporated body which is a defendant, with his multifarious duties to perform. The learned magistrate was not impressed by Mr. Arapata's explanation. In effect he found, as stated in para. 1 (2) of the memorandum of appeal, that Mr. Arapata's conduct amounted to such a wilful disregard of the consequences of the judgment in default as not to deserve relief. The question is whether that is the only criterion to apply.

Order 9, r. 9 provides that “it shall be lawful for the court to set aside or vary such judgment [an *ex parte* judgment] upon such terms as may be just”. This gives the court a wide discretion, and is to be contrasted with O. 9, r. 24 where an applicant has to show “sufficient cause” for not appearing at the hearing.

It is not disputed that the appellants have a defence on the merits of the case. Nor does it appear that they have been trying to obstruct or delay the course of justice. As soon as they became aware of the judgment by the application for execution they took steps to rectify the position. And, as I have already

observed, they have paid the decretal amount into court. In these circumstances, the justice of the case required the defence to be heard on its merits: *Kanji Purshottam Toprani v. K. C. Patel*, [1958] E.A. 346. As was said by Ainsley, J. (as he then was) in *Jamnadas V. Sodha v. Gordhandas Hemraj* ((1952), 7 U.L.R. at p. 11):

“Though I have the greatest sympathy with a busy magistrate who no doubt has a great deal to put up with in the way of belated applications

and requests for adjournments, and though two views can no doubt be taken of this matter, I yet think that insufficient attention was paid by the lower court to the fact that the appellant had a defence to put forward, and to the fact that no great hardship would have been likely to result to the respondent if an appropriate order for costs had been made. I may be doing the learned magistrate an injustice, but from a reading of his ruling of June 19 it seems to me that he has concentrated solely upon the poverty of the appellant's excuse.

In my view that is not the sole matter which must be considered in cases of this kind. The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. Though I realise that the views expressed may not be shared by everyone I think that there was not a full judicial exercise of discretion in this case, and that it was wrong under all the circumstances to shut out the defendant. He should I consider have been visited with a severe order as to costs, and permitted to defend."

The only remaining question is whether the applicants have approbated the judgment in default by Mr. Arapata's letter dated November 17, 1965 (annexure B. to Mr. Nabudere's affidavit dated February 15, 1966) in reply to a demand for payment of the decretal amount. It reads:

"I am in receipt of your Civil Suit No. 126/65 and wish to inform you that we have no authority at present where we should stand to pay you the sum of Shs. 862/- in which Mr. Samwiri Gashali and two others claim from the Sebei D.A.

However, by copy of this letter I am requesting the treasurer Sebei D.A. to take this matter to the finance committee which is the right body to authorise such payment (true copy of the letter attached)."

Even if this letter, with a copy to the appellants' treasurer, amounted to "approbating" the judgment – and here I do not share the confidence of the learned magistrate that it did – the court still had a discretion to set aside the judgment. In *Bartlam v. Evans*, [1937] A.C. 473, which is referred to in *The Supreme Court Practice* (1967), Vol. I, p. 111, a defendant, having had judgment entered against him in default of appearance, obtained from the plaintiff time in which to pay. He afterwards sought to have the judgment set aside on the ground that he had a defence to the claim. It was held that the Judge in Chambers had a discretion to set the judgment aside and, in the circumstances, was right in doing so.

For the above reasons I allow the appeal and set aside the order of the learned magistrate refusing to set aside the *ex parte* judgment and decree against the appellants. The suit is remitted to the court below for retrial. The appellants shall have leave to file their written statement of defence within fifteen days.

The costs in this appeal shall be costs in the cause.

Appeal allowed.

For the appellant:

GK Patel

GK Patel, Mbale

For the respondent:

DW Nabudere

DW Nabudere, Mbale

Ayor and another v Uganda
[1968] 1 EA 303 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 9 April 1968
Case Number: 74/1958 (68/68)
Before: Dickson J
Sourced by: LawAfrica

[1] Criminal Law – Adultery – Charge – Proper form – Undesirability of charging both the man and the woman – Necessity for separate counts if both charged – Penal Code, s. 150 A (U.).

[2] Criminal Practice and Procedure – Charge – Adultery – Undesirability of charging both the man and the woman – Necessity for separate counts if both charged – Penal Code, s. 150 A (U.).

[3] Evidence – Accomplice – Corroboration – Necessity for – General observations – Need for, in adultery cases.

Editor's Summary

The two accused, a man and a woman, were charged jointly with adultery. The woman pleaded “guilty” and subsequently gave evidence against the man. Her evidence was uncorroborated and was the only evidence implicating the man. He was convicted. On revision:

Held –

- (i) it is undesirable in adultery cases that both the man and the woman should be charged; but if they are both charged there should be separate counts (*Uganda v. Nikola and Another* (1) followed);
- (ii) the woman being an accomplice, her evidence being uncorroborated and it being the only evidence implicating the man, and the trial magistrate having failed to warn himself about this, his conviction could not stand.

Observations in general about accomplice evidence.

Conviction quashed.

Cases referred to in judgment:

- (1) *Uganda v. Nikola and Another*, [1966] E.A. 345.
- (2) *R. v. Baskerville*, [1916] 2 K.B. 658.
- (3) *Davies v. Director of Public Prosecutions*, [1954] 1 All E.R. 507.
- (4) *Fabiano Obeli and Others v. Uganda*, [1965] E.A. 622.
- (5) *R. v. Mullins* (1848), 3 Cox C.C. 526.

(6) *Chiu Nang Hong v. Public Prosecutor*, [1964] 1 W.L.R. 1279.

Judgment

Dickson J: This case came to my attention during the perusal of the monthly returns of cases coming before magistrates.

The two accused, Kosantino Ayor and Anamaria Acila, were charged with having committed adultery contrary to s. 150 A of the Penal Code. They appeared before the magistrate's court at Omoro on August 21, 1967, which was presided over by a magistrate grade II. On the same day, Anamaria Acila was convicted on her own plea of the offence charged, and she was cautioned under the provisions of s. 318 (1) (b) of the Criminal Procedure Code. Kosantino Ayor who had pleaded not guilty was tried on August 21 and Anamaria Acila gave evidence on behalf of the prosecution. He was convicted and fined Shs. 200/- or four months' imprisonment. In addition he was ordered to pay Shs. 600/- compensation to the aggrieved party.

As framed, the charge was in the following terms:

“Criminal Case No. 54/67 Omoro Divisional Court

Uganda

Vs.

1. Kosantino Ayor C/o Ocokober Village Omoro Sub. Cty.

2. Anamaria Acila C/o ” ” ” ” ”

Lango District

Statement of Offence

1. Kosantino Ayor and Anamaria. That on June 22, 1967 at 10 a.m. at Ocokober Village Omoro Gombolola, Lango District you were arrested for pregnant Anamaria Acila wife of Mikeli Okuk who is not your wife C/S 150 A and B of the Penal Code.
2. and you Anamaria Acila of the same address and the same date and the same time, unlawfully committed adultery with Kosantino Ayor who is not your husband C/S 150 A and B of the Penal Code.”

Not by any stretch of imagination can the charge be said to have been elegantly drawn. The defects are only too obvious. There is no statement of offence as such, but whatever there is of one, is rolled into the particulars; there is no such sub-s. (b) or para. (b) in s. 150 A of the Penal Code. In fact, the form and character of the charge, as laid, is a departure from the norm and is rather novel. It is not quite clear from the manner in which the document is drafted, whether the charge sheet contains one or two counts.

Magistrates and prosecutors must be reminded that it is undesirable in adultery cases that both the man and the woman should be charged, but if charged, there should be separate counts because the mens rea in each case is different (*Uganda v. Nikola and Another*, [1966] E.A. 345). I deem it necessary and appropriate to quote the following passages from the judgment in the above named case for the future guidance of those concerned with the administration of this particular facet of the criminal law (ibid. at pp. 347 – 348):

“This court has pointed out on more than one occasion that where it is alleged that a man and woman had committed adultery, it is undesirable, except in cases where both are likely to plead guilty, that both of them be charged; or, if charged, that both be joined in one count.

One would have thought that by reason of the difficulty of proof common prudence would dictate that only one of them should be charged. Furthermore, although adultery, as a criminal offence created for the first time under s. 150 A of the Penal Code, in 1964, has not been legally defined, it seems to me that an allegation that a man and woman have committed adultery must carry the implication that the man having known that the woman was married to another man unlawfully had sexual intercourse with her. Similarly that the woman with the full knowledge that she was married to someone unlawfully had sexual intercourse with another man not her husband. In which case both the man and the woman would be accomplices. The act of adultery by either of them is a separate offence since the mens rea required to constitute the offence in either case is different. Therefore, where both are charged it is desirable that there should be two separate counts, one for the man and the other for the woman.”

Be that as it may, there is in this case the fundamental matter of what is commonly called “accomplice evidence.” In order to establish its case against the accused Kosantino Ayor, the prosecution called two witnesses, namely Mikaele Okuk, the husband (the aggrieved person) of the accused Anamaria Acila; and Anamaria Acila herself. The only evidence implicating Kosantino Ayor is that of Anamaria Acila, who was, without question, an accomplice.

In other words, the case against Kosantino Ayor depended entirely on the evidence of Anamaria Acila. Kosantino Ayor gave evidence on oath denying the allegation. Indeed, his witness Jenasio Apenyo testified that when Anamaria Acila was first confronted by her husband she denied committing such an offence.

Section 131 of the Evidence Act reads:

“An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.”

This of course does not mean that any tribunal simpliciter or willy nilly may convict an accused person upon the uncorroborated evidence of an accomplice. There are certain principles and safeguards which must be adhered to before any court may proceed to conviction on the uncorroborated testimony of an accomplice.

In a criminal trial, where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge or the magistrate to warn himself that, although he might convict on his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, now has the force of a rule of law and where a judge or magistrate has failed to warn himself in accordance with it, the conviction would be quashed, even if, in fact there is ample corroboration of the evidence of the accomplice; unless the appellate court, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred (*R. v. Baskerville*, [1916] 2 K.B. 658; *Davies v. Director of Public Prosecutions*, [1954] 1 All E.R. 507). In *Fabiano Obeli and Others v. Uganda*, [1965] E.A. 622, the Court of Appeal quashed the convictions of the first two appellants, where the trial judge failed to direct the assessors or himself on the need for corroboration of accomplice evidence; and there being in fact no evidence against those two appellants except accomplice evidence.

The kind of corroboration required is not confirmation of independent evidence of everything the accomplice relates, as his evidence would be unnecessary if that were so: *R. v. Mullins* (1848), 3 Cox C.C. 526, 531. What is required is some independent testimony which implicates the accused in some material particular, and tending to show that not only the offence has been committed, but that the accused has committed it: *R. v. Baskerville* (*supra*). It must be made manifest in any judgment, that the court has directed itself in the terms stated above. It was stated by the Privy Council in *Chiu Nang Hong v. Public Prosecutor*, [1964] 1 W.L.R. 1279 (a rape case), that where the trial judge had in mind the risk of convicting without corroboration, but had decided to do so because he was convinced of the truth of the complainant's evidence, he should make it clear that he had the risk in question in his mind but nevertheless was convinced by the evidence, even though uncorroborated, that the case against the accused was established beyond any reasonable doubt. No particular form was necessary for that purpose, what was necessary was that the judge's mind on the matter should be clearly revealed.

I have deliberately dealt with this subject at length, in the hope that it might be of some guidance to magistrates and in particular to the unprofessional ones.

If for no other reason, in the instant case, as Anamaria Acila is an accomplice, and her evidence against Kosantino Ayor has not been corroborated, and there being in fact no other evidence implicating the accused Kosantino Ayor, the conviction cannot stand. Nowhere in his judgment, has the magistrate given any indication that he is aware of the principles enunciated above.

The conviction against Kosantino Ayor is quashed, and the sentence and order for the payment of compensation set aside. If the fine and compensation have been paid they must be refunded to Kosantino Ayor.

Order accordingly.

Neither party appeared nor was represented.

A Baumann & Co (Uganda) Ltd v Nadiope
[1968] 1 EA 306 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	9 April 1968
Case Number:	610/1966 (69/68)
Before:	Fuad J
Sourced by:	LawAfrica

[1] *Civil Practice and Procedure – Signature of summons – Summons signed by Registrar – Whether proceedings regular – Civil Procedure Rules, O. 5, r. 1 (3) (U.).*

[2] *Constitutional Law – Uganda – Exemption from civil jurisdiction afforded to Kyabazinga of Busoga – Cessation of exemption – Effect thereof on civil claims against ex-ruler in his personal capacity – Constitution of Uganda 1966, art. 119 (1) (d); Constitution (First Amendment) Act 1966 (U.).*

[3] *Constitutional Law – Immunity from civil jurisdiction – Whether it destroys a cause of action arising during period of immunity.*

Editor's Summary

The Kyabazinga of Busoga in Uganda was sued for goods supplied to him personally between August 29, 1963 and March 31, 1966 for an amount agreed to be Shs. 3,210/90. During the years 1963 to 1966 the defendant was the Kyabazinga of Busoga. Under the Uganda Constitution of 1962 the defendant was expressly excluded from the protection given to other rulers of Federal States, that protection being in the following terms:

“No civil proceedings shall be brought in any court against the Ruler in his personal capacity in respect of anything done or any obligation incurred after October 8, 1962.”

By a constitutional amendment on October 9, 1963, the express exclusion of the Kyabazinga of Busoga was removed and he became a protected Ruler. By the Constitution of 1966, on April 15, 1966, the protection was expressly continued, although the Territory of Busoga became a District under the same constitution. By a constitutional amendment on June 3, 1966, the protection afforded to the Ruler of the

territory of Busoga was removed. Thus the cause of action for recovery of the price of goods supplied arose during the period that the defendant was protected. The plaint was filed on September 22, 1966. The main question for determination was whether the effect of the protection afforded to the Kyabazinga was to cover exemption from jurisdiction, i.e. whether it was merely procedural or whether the protection was in the nature of a destruction of the cause of action against the Kyabazinga. The other question was whether the proceedings were regular, the summons having been signed by the acting Chief Deputy Registrar and not by a judge.

Held –

- (a) (i) there was never any immunity from legal liability but during the period of protection there had been exemption from civil jurisdiction;

- (ii) the proceedings were lawfully instituted after the period of protection had ceased in respect of a cause of action that had not been destroyed;
- (b) there being no evidence that the Registrar had no authority to sign the summons, the maxim “omnia praesumuntur rite esse acta” applied and the proceedings must be held to be regular (*Masaba v. Republic* (3) distinguished).
- Judgment for the plaintiff for the agreed amount with costs.

Cases referred to in judgment:

- (1) *Zoernsch v. Waldock*, [1964] 2 All E.R. 256.
- (2) *Empson v. Smith*, [1965] 2 All E.R. 881.
- (3) *Masaba v. Republic*, [1967] E.A. 488.

Judgment

Fuad J: By a plaint filed on September 22, 1966, the plaintiff company sues Sir Wilberforce Nadiope, who is well known in the public life of Uganda, for the sum of Shs. 7,312/90, the outstanding amount due on goods supplied to him at his request between August 29, 1963, and March 31, 1966. It has been agreed by counsel that if the suit is maintainable against Sir Wilberforce the amount due to the plaintiff company be reduced to Shs. 3,212/90.

An interesting and novel point of law was raised in the written statement of defence and has been argued before me. I have no doubt that this suit is being defended on a matter of principle, for the amount involved is trifling.

It has been submitted by Mr. Clerk for the defendant, that since the sum claimed arises out of transactions that took place between the years 1963 and 1966, when the defendant was the Ruler of Busoga, the suit is barred under the provisions of art. 119 (1) (d) of the 1966 Constitution, which was in force when the suit was instituted. The immunity conferred by these provisions was not, in his submission, affected by the Constitution (First Amendment) Act 1966 (Act No. 9 of 1966), for that Act did not have retrospective effect. Mr. Clerk further argued that if the court did not uphold this submission, the proceedings were incurably defective in that the summons to enter appearance was signed by the acting Deputy Chief Registrar who had no authority to do so.

Mr. Mboijana, for the plaintiff company, contended that Sir Wilberforce Nadiope was never lawfully the Kyabazinga of Busoga, and was thus never the Ruler of the Territory of Busoga. The Busoga (Validation) Act was contrary to the provisions of the then Constitution and of no effect. In any event, he submitted, if the defendant was the lawful Ruler of the Territory of Busoga, his immunity from civil process ceased when Busoga could no longer have a ruler by virtue of the amendments made by the Constitution (First Amendment) Act 1966, which converted the Territory of Busoga into a District. He argued that the immunity was intended to protect the status of the institution, and not that of the individual. It was not intended to bar a claim brought against the holder of the office of Ruler in his private capacity at any subsequent date if the immunity were removed. It was his contention that an analogy could be drawn from the position of a diplomat who lost his immunity in respect of acts done in his private capacity when he ceased to be accredited to the country concerned.

Mr. Clerk submitted in reply that Sir Wilberforce had always been accepted as the Kyabazinga of Busoga during the material time, and the Busoga

(Validation) Act was only passed to cure technical defects in the manner of his appointment.

In order to understand these submissions it is necessary to go into a part of the constitutional history of Uganda, with particular regard to the privileges of Rulers. The immunity from civil process accorded to the Ruler of the Territory of Busoga has met with many vicissitudes, depending on the status of Busoga within the framework of the various Constitutions.

Under the “Independence Constitution” which came into force on October 9, 1962, s. 124 was relevant. It was in the following terms:

- “124. (1) The following provisions shall apply in relation to the Ruler of a Federal State (other than the territory of Busoga) –
- (a) . . .
 - (b) . . .
 - (c) no civil proceedings shall be brought in any court against the Ruler in his personal capacity in respect of anything done or any obligation incurred after October 8, 1962”
 - (d) . . .”

Thus, though Busoga was a Federal State, the Ruler had no immunity under that section. When the Constitution of Uganda (First Amendment) Act of 1963 came into force on October 9, 1963, the words “(other than the territory of Busoga)” were deleted from sub-s. (1) of s. 124, so that upon the Ruler of the territory of Busoga were conferred the same immunities with regard to civil process as the other Rulers enjoyed. Under the Constitution adopted on April 15, 1966, the matter was dealt with in art. 119, the relevant parts of which were in the following terms:

- “119. (1) The following provisions shall apply in relation to the Ruler of a Kingdom and of the Territory of Busoga, that is to say;
- (a) . . .
 - (b) . . .
 - (c) . . .
 - (d) no civil proceedings shall be brought in any court against the Ruler in his personal capacity in respect of anything done or any obligation incurred before October 8, 1962.”

The position then was that though the Territory of Busoga became a District under that Constitution, the immunity of the Ruler was not affected. The final piece of legislation that related to this subject was the Constitution (First Amendment) Act 1966, which reduced Busoga to the status of an ordinary district without a special name, and deleted the words “and of the Territory of Busoga” from the opening words of art. 119 (1) of the “1966 Constitution”. That Act came into force on June 3, 1966.

I have now to consider the effect of these provisions relating to the immunity of a Ruler in his personal capacity in respect of civil proceedings. It is clear and understandable that the dignity of a Ruler was not thought compatible with his appearance in court as a defendant in a suit. However, it is necessary to examine the precise nature of the immunity afforded.

It seems to me that the wording of the relevant provisions is plain. With regard to tort the provisions do not say that all the acts of a Ruler shall be deemed to be innocent and lawfully done. Here we are only concerned with the law of contract. There is nothing that declared contracts entered into by a Ruler to be illegal or otherwise void. There is no question of incapacity. Such

contracts, in my opinion, could confer rights and impose obligations which the law must recognise; and all the usual consequences must follow. Such contracts are binding but they cannot be enforced by action. There is nothing to prevent a Ruler himself suing for breach of contract if he chose to do so. Indeed, the relevant paragraphs set out above all speak of “any obligation incurred”. There is surely a fundamental difference between a mere procedural bar and the destruction of a cause of action. In my view Mr. Mboijana is right when he says that the cause of action was not destroyed by the type of immunity conferred.

Clearly, while a person was covered by the immunity given by the provisions of art. 119 (1) (d) of the 1966 Constitution he could not be sued on any contract entered into after October 8, 1962. What then is the position where, as is the position here, the immunity from suit is removed by subsequent legislation?

Analogies are dangerous, but I agree with Mr. Mboijana’s submission that the nearest analogy is the immunity afforded to a diplomat. It is quite clear from the many authorities on the subject that diplomatic privilege does not give immunity from legal liability but only exemption from the jurisdiction of the court. He cited one case to illustrate the position of an envoy who loses his immunity by the cessation of his diplomatic employment and status (*Zoernsch v. Waldock*, [1964] 2 All E.R. 256).

Mr. Clerk argues that to allow this suit to be maintained will be to give retrospective effect to the amendment made to the “1966 Constitution” by Act 9 of 1966. I would agree with him if the effect of the amendment had been to alter a transaction already entered into, for example by making valid that which was previously invalid, or by making an agreement which had no effect at all into a binding agreement; but such is not the case here.

Of course, a Ruler was in a very different position from that of a diplomat, but I think the immunity afforded to him was in its legal effect the same. I have been able to find a recent case which is of interest: *Empson v. Smith*, [1965] 2 All E.R. 881. In 1961 the plaintiff brought an action claiming damages in the county court for breach of a tenancy agreement entered into with the defendant, who was a diplomat. In 1963 the proceedings were stayed on the ground of the defendant’s immunity from suit. In August, 1964, the plaintiff applied for a removal of the stay. On October 1, 1964, the Diplomatic Privileges Act 1964, came into force by which the defendant’s immunity was expressed not to extend to acts performed outside the course of his duties. The county court, in December, 1964, struck out the plaintiff’s action on the grounds that it had been null and void when it was commenced. On appeal, the Court of Appeal held that since the immunity was merely a procedural bar the change in the law permitted the action to proceed once the immunity previously granted had been removed. Danckwerts, L.J., pointed out that if the immunity ceased, the cause of action, if not barred by the Limitation Act, would remain. Diplock, L.J., indicated that the courts were not concerned with the manner in which the procedural bar was removed. The position was no different where such a bar was removed by Act of Parliament. In that case the action was commenced while the immunity was in existence and yet it was permitted to continue in view of the changes brought about by legislation. Here the plaintiff company obviously waited until there was no procedural impediment to the institution of the suit. I respectfully agree with the reasoning adopted by the Court of Appeal.

In my opinion the position is this – when the suit was instituted (on September 22, 1966) Sir Wilberforce Nadiope was not a person to whom art. 119 (1) (d) of the Constitution applied, because references to the Ruler of the Territory of Busoga were removed by Act 9 of 1966, with effect from June 3, 1966. He

therefore could not and cannot use the shield that was at one time available to him. After June 3, 1966, he could be sued just like anybody else in respect of any obligation incurred by him, whether it was incurred while he was a Ruler within art. 119 or not.

For the reasons I have given I hold, therefore, that the suit is not incompetent against the defendant on any ground contained in the Constitution in force at the material time.

I will now turn to the other matter raised by Mr. Clerk. I cannot help feeling that it must be somewhat of an afterthought, for although the constitutional matter is mentioned in the written statement of defence, the procedural defect he has urged upon me is not so mentioned. There is no doubt that the summons to enter appearance was signed by Mr. Oteng, the acting Deputy Chief Registrar. Mr. Clerk has stated that the officer concerned had no authority to sign the summons. He referred to the provisions of O. 5, r. 1 (3) of the Civil Procedure Rules, which is in the following terms:

“(3) Every such summons shall be signed by the Judge or such officer as he may appoint, and shall be sealed with the seal of the court.”

He cited no authority to me on the subject, but from what he said I am sure he had in mind a case determined by the learned Chief Justice (*Masaba v. Republic*, [1967] E.A. 488). Certainly at p. 495 of the report the learned Chief Justice, in referring to O. 5, r. 1 (3), stated that there was no evidence that the acting Deputy Chief Registrar had ever been appointed by a judge to sign summonses of any kind. This, of course, was a matter of evidence, and in any event, I am of the opinion that the learned Chief Justice's decision on this order was obiter. The application before him was not properly before the court because it was out of time. The procedure adopted was wrong. The documents initiating the proceedings were incurably defective, for several reasons. The document which began the proceedings before him should have been signed by the applicant or his advocate, and the Deputy Chief Registrar certainly had no power to sign on their behalf. Whatever form the proceedings took before the learned Chief Justice they were not a suit instituted under O. 4, and therefore the provisions of O. 5 could have no application. I need hardly say that an opinion expressed by the learned Chief Justice, be it obiter or not, is worthy of the highest consideration, and I differ from his approach with regard to O. 5 with diffidence and hesitation. However, I am constrained to approach the matter in this way. The Deputy Chief Registrar certainly has power under O. 5 to sign a summons to enter appearance if a judge has authorised him to do so; and he has signed as Acting Deputy Chief Registrar. I am of the opinion that in these circumstances a rebuttable presumption is created that the officer concerned was duly authorised, by the application of the maxim, *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium* – (everything is presumed to be rightly and duly performed until the contrary is shown). This, of course, is only a presumption and it can be rebutted by the minimum of evidence. I am of the opinion that for the purposes of this suit there is no evidence whatever before me that the officer concerned had no authority to sign the summons. Mr. Clerk, of course, could not be permitted to give evidence on the matter. He was, in effect, saying that in the absence of any evidence I should presume that the summons was signed without authority. It is to be noticed that there is no requirement in O. 5, r. 1 (3) that the authority of the judge must be given by a notice that has to be made public. As I read the rule there is nothing to prevent a judge handing a file over to an officer of the court and saying, “Please sign this summons for me”. In the absence, therefore, of evidence to the contrary I do not find that the suit which was duly instituted under O. 4 is defeated by any infringement of O. 5.

It will be seen that my decision has rendered it unnecessary for me to consider whether or not Sir Wilberforce Nadiope was lawfully the Kyabazinga (and therefore the Ruler of Busoga) or not, at any material time. I am glad that I have not been called upon to decide this important question without the assistance of the Attorney-General as amicus curiae.

For the reasons I have given, I hold that the claim of the plaintiff is valid and the proceedings regular. Since counsel have agreed on the amount due judgment will be entered for the plaintiff against the defendant for Shs. 3,212/90 with interest as prayed.

Judgment for the plaintiff.

For the plaintiff:

C Mboijana

Binaisa, Mboijana & Co, Kampala

For the defendant:

AV Clerk

AV Clerk, Kampala

Ghelani v Radia
[1968] 1 EA 311 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	26 April 1968
Case Number:	193/1964 (71/68)
Before:	Fuad J
Sourced by:	LawAfrica

[1] *Civil Practice and Procedure – Preliminary point of law – Whether if successful suit to be dismissed – Civil Procedure Rules, O. 7, r. 11 (d) and O. 6, r. 28 (U.).*

[2] *Limitation – Money had and received – Period of limitation for action of – When cause of action accrues – Limitation Act, ss. 4 and 35 (U.).*

[3] *Limitation – Pleading – Fraud or concealment must be alleged – Limitation Act, ss. 20 and 26 (U.).*

Editor's Summary

The plaintiff in 1964 sued the defendant for Shs. 14,000/- as money received by the defendant for the use of the plaintiff. The money was alleged to have been paid over in 1957, more than six years before the suit was instituted, but the failure to pay it over was alleged not to have come to the knowledge of the

plaintiff until 1962. No fraud or concealment was alleged and no reply to the defence of limitation was filed by the plaintiff.

Held –

- (i) the period of limitation was six years;
- (ii) the general rule is that the cause of action accrues when the defendant receives money to which he is not entitled and thus becomes unjustly enriched, or when the plaintiff pays money on the defendant's behalf, i.e. in this case in 1957;
- (iii) by his pleading the plaintiff had not shown any ground upon which he could escape the application of the Limitation Act and his suit was statute-barred.

Suit dismissed with costs.

Cases referred to in judgment:

(1) *North American Land Co. v. Watkins*, [1904] 1 Ch. 242.

(2) *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154.

(3) *Soar v. Ashwell*, [1893] 2 Q.B. 390.

(4) *Kitchen v. R.A.F. Association*, [1958] 2 All E.R. 241; [1958] 1 W.L.R. 563.

Judgment

Fuad J: By this suit, which was instituted on April 8, 1964, the liquidator of a limited liability company in voluntary liquidation, sues the defendant on behalf of the company for Shs. 14,000/- and for interest. Various interlocutory matters have been before several judges of this court and it is only now, four years after the original plaint was filed, that the suit is ready for trial.

It was agreed by Mr. Ghelani for the plaintiff and by Mr. Pandit for the defendant, that certain preliminary points of law should first be argued before me. It seems to me that the question of limitation must first be dealt with. As will be seen, this point of law is raised by the pleadings and can, in my view, properly be disposed of as a preliminary issue under O. 6, r. 27 of the Civil Procedure Rules. The material part of the amended plaint dated December 22, 1964, is as follows:

- “1. The plaintiff’s claim against the defendant is for Shs. 14,000/- payable by the defendant for the said sum received by the defendant for the use of the plaintiff.

“Particulars

“Sometime between April 17, 1957 to May 30, 1957 the defendant was paid by the plaintiff through the plaintiff’s advocates, Messrs. Patel & Mehta of Kampala, from the plaintiff’s funds with the plaintiff’s said advocates a sum of Shs. 14,000/- for its payment by the defendant at Kampala to the executors of the estate of the defendant’s deceased brother (the late Popatlal Jeshang Radia). The defendant never paid out the said sum to the said executors as aforesaid which (non-payment) came to the knowledge of the plaintiff on July 29, 1962, and on August 8, 1962 the plaintiff was ordered by this Honourable Court to pay the said sum together with interest and costs, to the said executors against the plaintiff.

- “2. The plaintiff also claims against the defendant Shs. 9,760/- interest at 12 per cent. per annum from July 1, 1958, to March 31, 1964 as damages on the aforesaid sum (of Shs. 14,000/-).”

The defendant, *inter alia*, pleaded that the claim was barred by limitation by the following paragraph of the defence:

- “3. The plaintiff’s alleged cause of action did not accrue within 6 years before commencement of this action and the defendant will rely on the Limitation Ordinance (No. 46 of 1958), s. 4.”

The Limitation Act (Cap. 70, Laws of Uganda, 1964) came into force on May 7, 1959, and the transitional provisions set out in s. 35 of the Act will be relevant.

Mr. Pandit’s argument, in substance, was that the Limitation Act 1623 (21 Jas. 1, c. 16) applied when the cause of action arose; an action for money had and received was always treated in the class of simple contracts for the purposes of that Act; and s. 4 (1) (a) of the Limitation Act (Cap. 70) now applied. Section 35 thereof did not alter the period of limitation applicable, which was six years. He cited a number of authorities on the accrual of causes of action where quasi-contractual obligations were involved. The general rule seems clear that the cause of action accrues when the defendant receives money

to which he is not entitled and thus becomes unjustly enriched, or when the plaintiff pays money on the defendant's behalf (see Franks, *Limitation of Actions*, p. 167, and the cases cited in footnote 94).

Mr. Pandit pointed out that the plaintiff had not chosen to reply under O. 8, r. 18, and submitted that there was no sufficient pleading to take the suit outside the provisions of the Act; nothing was pleaded that could be said to have stopped time running.

Mr. Ghelani submitted that when the money was handed over to the defendant a trust was created; or if he was not strictly a trustee he was in the same position as an agent. Time did not, therefore, begin to run against the plaintiff until the defendant's breach had come to his notice, that is to say (as was pleaded) on July 29, 1962. He cited various cases to me. In *North American Land Co. v. Watkins*, [1904] 1 Ch. 242, an agent was sent to the U.S.A. to buy land for his company. After buying it and duly causing it to be conveyed to the company, he made a profit for himself out of the transaction. The company's claim for this profit was held not to be defeated by the expiration of the statutory period of limitation. The agent was placed in the position of a trustee of money which he held in trust. In affirming the decision, the Court of Appeal held that the conduct of the agent had been fraudulent so that the company was entitled to recover in any event.

In *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co. v. Sharpe*, [1892] 1 Ch. 154, directors paid interest to shareholders out of the capital of the company, whereas by the articles of association this was prohibited. It was held that the directors were in the position of trustees and the Statute of Limitations then in force was no bar to the action. In *Soar v. Ashwell*, [1893] 2 Q.B. 390, a solicitor who had assumed to act as a trustee was held to be an express trustee for the purposes of the law of limitation and lapse of time did not bar the action.

Mr. Ghelani submitted that the transaction pleaded was a fiduciary one and there was an obvious case of concealment. He had pleaded as has been seen:

“ . . . which (non-payment) came to the knowledge of the plaintiff on July 29, 1962 . . . ”

It seems to me that there is no averment in the pleadings that would entitle the plaintiff to rely on s. 20 or on s. 26 of the Limitation Act. No fraud is alleged. There is nothing in the pleadings to suggest that the defendant received the money paid to him in a fiduciary capacity which was pre-existing or which had even been created by the transaction itself. This is so even if the plaintiff could be regarded as a “beneficiary under a trust” for the purposes of s. 20 of the Act. With regard to s. 26 of the Act, the action is not stated to be based on the fraud of the defendant for the purposes of para. (a) nor does any question of mistake arise for para. (c) to be applicable. When para. (b) is considered, again, in my opinion, the pleading of the plaintiff will be seen to be defective if that paragraph could have been relied upon to defeat the statute. The fact that the plaintiff may only have discussed this cause of action in July, 1962 does not necessarily mean that it was concealed by the defendant's fraud (see Franks, *Limitation of Actions*, pp. 202 and 203, where the authorities are set out. The case of *Kitchen v. R.A.F. Association*, [1958] 2 All E.R. 241; [1958] 1 W.L.R. 563, seems particularly in point).

I hold therefore that by his pleading (and by his failure to exercise his right of reply under O. 8, r. 18) the plaintiff has not shown any ground upon which he can escape the application of the Limitation Act. I am of the opinion that, as pleaded, the cause of action accrued at the latest on May 30, 1957, when the

amount claimed was handed over to the defendant, and that therefore the suit is statute barred.

In the event, I do not consider it necessary to go into the submissions made by Mr. Ghelani with regard to the written statement of defence. The Limitation Act was properly pleaded and this particular defence has succeeded.

No authorities have been cited to me on the question whether I should now reject the plaint under O. 7, r. 11 (*d*) or dismiss the suit under O. 6, r. 28. The preliminary point of law was argued with the consent of the parties, as has been seen. No application for amendment of the plaint has been made. In my opinion my decision on the point of law raised, substantially disposes of the whole suit. I see no reason why these rules should not be read together. Order 6, r. 28 was added in 1960, and is not expressed to be subject to the provisions of O. 7, r. 11. I therefore dismiss the suit and enter judgment for the defendant with costs.

Order accordingly.

For the plaintiff:

MC Ghelani

MC Ghelani, Kampala

For the defendant:

SV Pandit

SV Pandit, Kampala

Camille v Merali and another
[1968] 1 EA 314 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 9 May 1968
Case Number: 22/1967 (74/68)
Before: Sir Clement de Lestang V-P, Duffus and Spry JJA
Sourced by: LawAfrica

(Reference to the full Court against the decision of Law JA)

[1] *Civil Practice and Procedure – Appearance – Trial – Party and advocate absent at adjourned hearing – Proceedings dismissed – Whether order proper.*

[2] *Civil Practice and Procedure – Dismissal of proceedings – For want of appearance by party in Court – Whether such dismissal is an “order” or a “judgment” giving rise to a “decree” – Whether appeal lies without leave – Civil Procedure Act, s. 2; Civil Procedure (Revised) Rules 1948, O. 16, rr. 3 and 4; O. 9, r. 19 (K.).*

Editor's Summary

The applicant, as a result of an order made on appeal, became entitled to file a counter-claim. She did so. When her counter-claim came on for hearing in the High Court it was adjourned for the day, after the advocate for the applicant had opened his case and had called the applicant as a witness. On the next day, a Friday, the applicant appeared in court but her advocate did not, he having written to the court to complain that the adjournment was inconvenient. The proceedings were then adjourned again until the following Monday. On Monday neither the applicant nor her advocate appeared and the judge made an order dismissing the counter-claim. The respondents drew up a "decree" to give effect to this. The applicant then applied to the High Court to set aside the order but her application was refused, the judge apparently holding that the applicant had a right of appeal against the "decree". She then applied to the Court of Appeal for leave to appeal against the order dismissing her counter-claim. Her application was heard and refused by a single judge of

the Court of Appeal. The applicant then asked for this refusal to be reviewed by a full court. On review:

Held –

- (i) the decision dismissing the counter-claim was an order and not a judgment so that no decree could properly be extracted to give expression to it; therefore no appeal lay from it except with leave and the judge had misdirected himself in his reasons for refusing to set the order aside; but
- (ii) the order of dismissal was justified in the circumstances and should stand.

Reference dismissed with costs.

No cases referred to in judgment

[**Editorial Note:** For previous proceedings, see [1966] E.A. 411.]

May 9, 1968. The following considered judgments were read:

Judgment

Spry JA: This is a reference from the decision of a single judge of this court (Law, J.A.), dismissing an application for leave to appeal.

The background to the application is that a suit was brought by the present respondents against the applicant for arrears of rent. The respondents applied for summary judgment under O. 35, which was granted subject to a proviso that, if the applicant deposited the decretal amount in court within twenty-one days, execution would be stayed until the determination of any proceedings the applicant might take either in the suit or by a separate action. On appeal to this court, the decision and decree was upheld so far as it gave judgment for the amount claimed but otherwise set aside, orders being substituted which (*inter alia*) allowed the applicant to file a counter-claim. This she did. When the counter-claim came up for hearing, on June 15, 1967, Mr. Mandavia, the advocate for the applicant, opened his case and called the applicant as a witness. Shortly afterwards, the hearing was adjourned for the day. The following day, June 16, the defendant was present but not Mr. Mandavia who had written to the court complaining that the adjournment to a day subsequent to those set down in the monthly call-over was inconvenient to him and he made the, to me extraordinary, statement that he had agreed with his client “to do her case for only the two days”. This was on a Friday morning, and to accommodate the applicant, counsel for the respondents not objecting, the proceedings were adjourned to the following Monday. On that day, June 19, neither Mr. Mandavia nor his client was present and the learned judge dealt with the matter as follows:

“O/ counter-claim dismissed.”

(It is common ground that “O” is an abbreviation for “Order”.)

A decree was extracted six days later and after a further two days a motion was heard by the applicant asking for leave to appeal against the learned judge’s “Order”. This was refused, the learned judge saying:

“I would not and will not give leave to appeal against the order per se. I think defendant has a right of appeal against the decree and it may be that in pursuance of that he can attack the order. But I will not give leave to the judgment debtor to attack an order per se that was made before it.

Application dismissed with costs.”

The applicant then filed a notice of motion in this court asking leave to appeal

“against the Order of the High Court of Kenya dated June 19, 1967 to proceed *ex parte* and dismissing the applicant’s defence . . .”

The motion was heard by Law, J.A., who dismissed the application. Mr. Mandavia then intimated, under r. 19 (6) of the Eastern African Court of Appeal Rules 1954, that he wished that decision to be reviewed by a full court.

At the hearing before us, Mr. Mandavia abandoned much of his argument before Law, J.A., and relied on two arguments, first, that the application was competent because the decision of June 19 was an order and not a judgment and, secondly, that if the application was competent, it should be allowed, as otherwise the applicant was being deprived of the right to a hearing.

Mr. Da Gama Rose, for the respondents, argued that the decision of June 19 was a judgment, giving rise to a decree, because it finally determined the rights of the parties. He submitted that the words “order of dismissal for default” in the definition of “decree” in s. 2 of the Civil Procedure Act relates only to suits which are dismissed in default of appearance. In his submission, the applicant could appeal as of right and therefore the application was incompetent. In the alternative, he submitted that the decision was given in the exercise of judicial discretion and should not lightly be interfered with, and was in itself not unreasonable, since the matter came on June 19 after three adjournments had been granted at the applicant’s request and she had been present in court when June 19 was fixed for the resumed hearing.

In his judgment, Law, J.A., held that the decision of June 19, although described as an order, was in effect a judgment. With respect, I cannot agree. It is perhaps unfortunate that the learned trial judge did not indicate what power he was exercising when he gave his decision on June 19. Mr. da Gama Rose submitted that the decision was given under O. 16, r. 4 of the Civil Procedure (Revised) Rules 1948 and that the learned judge had proceeded “to decide the suit forthwith”. With respect, I do not think that can have been so, for two reasons. First, had the learned judge been acting under r. 4 and deciding the case on its merits, he would undoubtedly have given his reasons, however briefly; secondly, it seems to me that r. 3 of the same Order is so obviously more appropriate. Order 16, r. 3, provides that where a party fails to appear on a day to which a hearing has been adjourned, the judge is empowered “to dispose of the suit in one of the modes directed in that behalf by O. 9”, and O. 11, r. 19, enables the court, where the defendant appears and the plaintiff does not appear, to “make an order that the suit be dismissed”. That is exactly what the learned judge did, the applicant being the plaintiff in relation to the counter-claim. In my view, therefore, the decision of June 19 was clearly not a judgment, and no decree could properly have been extracted to give expression to it. The correct formal expression should have been an order. This accords with the definition of decree in s. 2 of the Civil Procedure Act, which expressly excludes “any order of dismissal for default”. I am satisfied, then, that no appeal lay from the decision of June 19 except with leave.

It follows, of course, if the decree was improperly extracted, that if the learned trial judge based his refusal of leave to appeal on the fact that an appeal lay from the decree, which is how I understand his order, that was a misdirection. However, this court is not concerned with an appeal from the order refusing leave to appeal but with a direct application for leave to appeal.

The second question goes to the merits of the application and is whether this court should give leave to appeal against the decision dismissing the counter-claim. Mr. Mandavia based his argument on the fact that the applicant had been deprived of the right to a hearing. I cannot accept that proposition. The applicant was present in court when the hearing was adjourned to the 19th and she was represented by an advocate, even though he was not present at that time. The court had already shown indulgence to the applicant and

Mr. Mandavia, who is an experienced advocate, must have known full well that the course followed, when he absented himself on June 16 and when neither he nor his client appeared on June 19, was unwise as well as improper. I would add that the tone of letters addressed to the court by Mr. Mandavia and his client was singularly lacking in respect. It is impossible not to feel some sympathy for the applicant, who probably does not realise that in busy courts adjournments beyond the days set down are often unavoidable. That does not, however, affect the merits of this application. I respectfully agree with Law, J.A., that the learned judge was fully justified in acting as he did on June 19 and I can see no reason that would justify this court giving leave to appeal. I would dismiss this reference with costs.

Sir Clement De Lestang V-P: I have had the advantage of reading in draft the judgment prepared by Spry, J.A., and I entirely agree with it. Two questions arise for the decision in this reference. The first is whether or not the decision, to use a neutral word, of Rudd, J., in the court below dismissing the counter-claim, was an order or a decree. If it was an order the applicant could appeal only with leave but it was nevertheless open to her to apply to the court below under O. 9, r. 20 (1) to set the dismissal aside for good cause. The applicant chose the former course and Rudd, J., as I understand his decision, refused leave on the ground that the decision was a judgment giving rise to a decree from which the applicant had a right to appeal.

With respect to the learned judge and to Law, J.A., who agreed with his view I consider that the decision did not give rise to a decree for two reasons. First, the definition of decree in s. 2 of the Civil Procedure Act excludes “any order for dismissal for default”. There can, I think, be no doubt that the decision in the present case was such an order as it is perfectly clear that Rudd, J., did not purport to give a judgment on the merits of the case but merely dismissed it because neither the applicant nor her advocate was present. Secondly, according to the same definition, to constitute a decree the decision must be one “which is complete and final as regards the court which passed it”. The decision in question, as has been shown already, was not final as it could be set aside by the court which passed it.

The second question is whether the applicant has shown good cause in this court for granting her leave to appeal. It seems to me that Rudd, J. was entirely justified in dismissing the applicant’s counter-claim for default and in the absence of any explanation or excuse for such default I fail to see how he could have granted her leave to appeal against his order of dismissal. In any case this not being an appeal against Rudd, J.’s order but an application to this court for leave, on what ground, I ask myself, is the application founded? The only possible ground as I apprehend it would be some satisfactory explanation or excuse for non-appearance on the material day and I am sorry to say that none has been given. There is thus no merit whatsoever in the application and there will be an order in the terms proposed by Spry, J.A.

Duffus JA: I also agree.

For the applicant:

GR Mandavia

GR Mandavia, Nairobi

For the respondents:

M da Gama Rose

Shapley, Barrett, Marsh & Co, Nairobi

Damani v Ndarumaki
[1968] 1 EA 318 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam
Date of judgment: 15 June 1966
Case Number: 25/1965 (76)
Before: Biron J
Sourced by: LawAfrica

[1] Limitation – Special period laid down by statute – Whether general rules under Indian Limitation Act can apply (T.).

[2] Limitation – Rent Restriction – Appeal – Time taken in obtaining copy of order – Whether s. 12 of the Indian Limitation Act 1908 applies to appeals under r. 4 of the Rent Restriction (Appeals) Rules 1962 (T.).

[3] Rent Restriction – Premises – Whether the Rent Restriction Act applies to premises let partly as residential and partly as business premises – Rent Restriction Act (Cap. 497), s. 2 (2) (T.).

[4] Rent Restriction – Limitation – Appeal – Time taken in obtaining copy of order – General rules of the Indian Limitation Act 1908 apply to appeals under r. 4 of the Rent Restriction (Appeals) Rules 1962 (T.).

[5] Statute – Retrospective operation – Rent Restriction – Power of Rent Restriction Board to award arrears of rent for period before Act came into operation.

Editor's Summary

The appellant was the landlady of premises in Morogoro which were let to a Mr. Makinda who sub-let a shop which comprised part of the premises to the Domestic and Hotel Workers Union from whom he collected rent. On January, 1963, the premises as a whole were let to the respondent who went into occupation of part of the premises which he used for residential purposes and the Domestic and Hotel Workers Union continued as sub-tenants in the other part. The respondent paid the rent for January and February, 1963 but paid no further rent and left the premises without notice on January 31, 1964. The appellant obtained an order from the Morogoro Rent Restriction Board on May 25, 1965, for eleven months' arrears of rent at Shs. 90/- per month, half of her costs, and interest on the award at seven per cent. The Board found that the premises as a whole were neither residential nor commercial but constituted two distinct entities, one residential premises and the other commercial. The Board further found that it had no jurisdiction to deal with the commercial part of the premises. Lastly, the Board found that it had jurisdiction to deal with arrears of rent accrued before the Rent Restriction Act was applied to Morogoro on January 1, 1964. The appellant's main grounds of appeal against the order of the Board were that (i) the Board should not have confined its order to the residential part of the premises but should have awarded arrears of rent for the premises as a whole; (ii) the Board should have held that the

premises were residential premises and (iii) the standard rent of the premises was Shs. 250/- per month. The respondent filed a cross-objection, the main ground of which was that the Board had no jurisdiction to entertain claims for rent for a period prior to the Act being applied to Morogoro on January 1, 1964. At the hearing of the appeal, the respondent's counsel raised the preliminary objection that the appeal was time-barred, in that it was not made within the thirty-day period prescribed by r. 4 of the Rent Restriction (Appeals) Rules 1962. The application for a copy of the order of the Board was made on June 2, 1965, a week after the date of the order but the copy of the order was not furnished until October 22, 1965.

Held –

- (i) the Rent Restriction Act and the Rent Restriction (Appeals) Rules 1962 are not a complete code so as to exclude the general provisions of the Limitation Act; therefore the time required for obtaining a copy of the order

of the Board was excluded in computing the limitation period and the appeal was not time-barred;

- (ii) the premises were severed into residential and commercial premises during the tenancy of the respondent's predecessor and remained so during the tenancy of the respondent; the Board had therefore no jurisdiction over the premises let to the Union (*Habib Lalji Jetha and Others v. Akbar Datu Hirji and Others* (7) distinguished, *Gidden v. Mills* (9) adopted);
- (iii) the Board had jurisdiction to deal with arrears of rent accruing prior to the coming into force of the Act (*Suleman Ibrahim v. Awadh Said* (13) applied);

Observations as to the applicability of decisions of the English courts.

Appeal and cross-objection dismissed.

Cases referred to in judgment:

- (1) *Vattakulakaran Sowdaker Abu Backer Sahib v. The Secretary of State for India in Council*, I.L.R. (1911), 34 Madras 505.
- (2) *Kopparthi Lingayya and Three Others v. Araveti Chinna Narayana and Eight Others*, I.L.R. (1918), 41 Madras 169.
- (3) *Dropadi v. Hira Lal*, I.L.R. (1912), 34 Allahabad 496.
- (4) *Veerama v. Abbiah*, I.L.R. (1895), 18 Madras 99.
- (5) *Beni Prasad Kuari v. Dharaka Rai*, I.L.R. (1901), 23 Allahabad 277.
- (6) *Joti Sarup v. Ram Chandar Singh*, W.N. (1902) 34.
- (7) *Habib Lalji Jetha and Others v. Akbar Datu Hirji and Others*, [1964] E.A. 689.
- (8) *Thompstone v. Simpson*, [1952] 1 All E.R. 431.
- (9) *Gidden v. Mills*, [1925] 2 K.B. 713.
- (10) *Gee v. Hazleton*, [1932] 1 K.B. 179.
- (11) *Phillips v. Hallahan*, [1925] 1 K.B. 756.
- (12) *Re Hale's Patent*. [1920] 2 Ch. 377.
- (13) *Suleman Ibrahim v. Awadh Said*, [1963] E.A. 179.
- (14) *Valji Keshav Oza v. C. P. Jani & Sons*, [1957] E.A. 184.
- (15) *Gangabai Harji v. Bhoja Keshav*, [1957] E.A. 304.

Judgment

Biron J: This is an appeal and cross-objection from the order of the Morogoro Rent Restriction Board allowing in part the applicant landlord's claim for arrears of rent.

At the hearing of the appeal Mr. Tahir Ali, for the respondent, submitted that the court had no jurisdiction to entertain the appeal as it was time-barred, and this objection was taken as a preliminary

point.

The judgment and order of the Board was delivered on May 25, 1965, and as so endorsed on the copy judgment, application for a copy of the judgment was received on June 2, a certified copy of the judgment was ready on September 20 and was supplied on October 22.

By r. 4 of the Rent Restriction (Appeals) Rules 1962 (Government Notice No. 357 of 1962):

“No appeal to the High Court from an order, decision or determination of a Board shall be made later than thirty days from the date of such order, decision or determination.”

It was therefore submitted on behalf of the respondent that the appeal is time-barred.

By s. 12 of the Indian Limitation Act 1908:

- “(1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.
- (2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.
- (3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.
- (4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.”

If time is allowed for the obtaining of a certified copy of the judgment the appeal is certainly within time. But Mr. Tahir Ali submitted that s. 12 of the Limitation Act does not apply to appeals from an order of the Rent Restriction Board, its application being expressly excluded by s. 29 of the Limitation Act, which reads:

- “(1) Nothing in this Act shall;
 - (a) affect the Indian Contract Act 1872, s. 25:
 - (b) affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India.”

The remainder of the section is not relevant.

And the Rent Restriction (Appeals) Rule as above set out lays down a prescribed period of limitation.

Unless precluded by authority I would construe “affect” in s. 29 of the Limitation Act ejusdem generis with “alter”; that is, that where a prescribed period of limitation is laid down the general provisions of s. 12 (2) of the Act would not apply to alter or affect the specific period prescribed, but it would apply to the manner in which such period is computed. It must however be conceded that there are authorities to a contrary construction. But as is so often the case with the decisions of Indian courts, there is a conflict of opinion. In *Vattakulakaran Sowdaker Abu Backer Sahib v. The Secretary of State for India in Council*, I.L.R. (1911), 34 Madras 505, it was held, quoting from the headnote:

“The provision in s. 12 of the Limitation Act of 1877 that in computing the period of limitation prescribed for an appeal the time requisite for obtaining a copy of the order appealed against should be excluded does not apply to appeals under s. 10 of the Madras Forest Act 1882.

The express power given to the Governor in Council by s. 10 of the Forest Act to extend the time for appeal under this section shows that the legislature did not intend that the general provisions of the Limitation Act should apply to such cases.

The Madras Forest Act is a special and local enactment and the application of s. 12 of the Limitation Act to appeals under that Act affects the period prescribed by that Act, within the meaning of s. 6 of the Limitation Act.

The provisions of s. 6 of the Limitation Act exclude the applicability of s. 12 of the Act in the case of appeals under s. 10 of the Madras Forest Act.”

This case was cited with approval in *Kopparthi Lingayya and Three Others v. Araveti Chinna Narayana and Eight Others* wherein Seshagiri Ayyar, J. said (I.L.R. (1918), 41 Madras at p. 177):

“Both sides are agreed that the only question to be considered in this reference is whether the time taken up for obtaining copies of the order appealed against should be deducted in computing the period of limitation fixed by s. 46, cl. (4) of the Provincial Insolvency Act. The decision of the question turns largely upon the interpretation to be placed upon s. 29 of the Indian Limitation Act. A very learned argument was addressed to us by Mr. A. Krishnaswami Ayyar upon the meaning to be attached to the word ‘affect’ in cl. (1) (b) of that section. Apart from authority, if I were deciding this question for the first time, I would have respectfully concurred in the view taken by three learned judges of this court including the present Chief Justice in *Vattakulakaran Sowdaker Abu Backer Sahib v. The Secretary of State for India*, I.L.R. (1911), 34 Madras 505. The word ‘alter’ would apply directly to similar provisions in the Limitation Act, if any, giving an extended period to suits or appeals of the nature provided for in the Special Act. The word ‘affect’ is more comprehensive. Whenever by a process of computation or exclusion or deduction the special period fixed by the enactment is indirectly extended or cut down, it must be taken that that period has been *affected*.”

It is also not without interest to refer to an earlier case, that of *Dropadi v. Hira Lal*, I.L.R. (1912), 34 Allahabad 496, wherein the authorities were reviewed and considered by a full Bench, and it was stated in the judgment (*ibid.* at p. 502):

“After examining the cases mentioned above and others, Muthusami Ayyar, J., in *Veeramma v. Abbiah*, I.L.R. (1895), 18 Madras, 99 came to the conclusion that the general provisions of the Limitation Act of 1877 were applicable to suits and other proceedings under Acts prescribing special periods of limitation, unless those Acts were complete Codes in themselves to which the general provisions of the Limitation Act could not be applied without incongruity. This view was accepted by Strachey, C.J., and Banerji, J., in *Beni Prasad Kuari v. Dharaka Rai*, I.L.R. (1901), 23 Allahabad 277 and by Banerji, J., in *Joti Sarup v. Ram Chandar Singh*, W.N. (1902) 34, both cases under the N.-W. P. Rent Act 1881.

There is therefore authority for the proposition that the general provisions of the Limitation Act 1877, are applicable to suits and other proceedings under other Acts which prescribe special periods of limitation, but which are not intended to be complete Codes in themselves, and that the words ‘affect or alter’ in s. 6 of the Limitation Act of 1877 relate only to the period prescribed and not to the way in which that period is to be computed. The same words appear in s. 29 of the present Limitation Act. It cannot, however, be said that this view has gone unchallenged. Shephard, J., in the case reported in I.L.R., 18 Mad., 99, expressed the opinion that the application of the general provisions of the Limitation Act to periods of limitation prescribed by other Acts did ‘alter or affect’ those periods and Chandavarkar, J., in a land acquisition case in I.L.R., 30 Bom., 275, said it was a moot question whether the general provisions of the Limitation Act could be applied in this way, though he followed a previous decision of the Bombay High Court by which he considered himself bound.

The question is one of considerable difficulty, and it must be admitted that at first sight it is straining the words to hold that the application of the general provisions of the Limitation Act to periods of limitation prescribed by other Acts does not 'affect or alter' those periods. In one sense it certainly does. But the construction accepted by Strachey, C.J., Banerji, J., and Muthusami Ayyar, J., seems to us to be correct. Apart from the history of this piece of legislation, we find it difficult to believe that when the legislature introduced, as it has, into several Acts, provisions giving a right of appeal and prescribing periods within which the right may be exercised, it intended as a general rule that those provisions should be applied without reference to the general provisions contained in the general Limitation Act. In many, if not most, cases the Code of Civil Procedure is made applicable, with the result that an appellant must produce a copy of the order against which he is appealing. It is reasonable to suppose that the legislature intended to give him time to procure a copy of the order. The general provisions of the Limitation Act are founded mainly upon equitable considerations which apply as much to periods of limitation prescribed by special Acts as to periods of limitation prescribed by the Limitation Act itself.

Upon the question whether this or that Act is a complete Code in itself to which the Limitation Act should not be applied, there is considerable difference of opinion."

And in that case it was held that the Provincial Insolvency Act, the enactment under consideration, was not a complete Code in itself and therefore s. 12 of the Limitation Act applied. It would not, I think, be particularly rewarding to cite or even refer to other cases, but despite the divergence of opinion there would appear to emerge a general principle, as stated in Rustomji on The Limitation Act (1938 Edn.), p. 527:

"Applicability of General Provisions of the Limitation Act to Cases under Local and Special Laws – (The notes under this paragraph must now be read in the light of the recent amendment of s. 29 by Act 10 of 1922). When the special or local law is not in itself a complete Code, the general provisions of the Limitation Act (e.g., s. 4 re the Court being closed when the period expires; s. 5 re enlarging time for appeal; s. 12 re exclusion of time for copies of judgments, etc.; s. 14 re exclusion of time spent in infructuous proceedings; and s. 18 re enlarging time for concealed fraud) are ordinarily applicable to proceedings under such special or local law, inasmuch as such general provisions do not affect or alter the period prescribed by the special or local law, but only the manner in which that period is to be computed."

It should be noted that although the above is on the amended s. 29 of the Act, which is not applicable to this country, the principle enunciated is the same as under the old, unamended section, which applies here. However, as to what constitutes a complete Code, as can be gathered from the last judgment quoted, is not without considerable difficulty. The Rent Restriction (Appeals) Rules 1962 already referred to, lay down in r. 5 that:

- "(1) Every appeal to the High Court shall be preferred in the form of a memorandum signed by the appellant or his advocate and shall be accompanied by a certified copy of the order, decision or determination appealed from.
- (2) The memorandum shall set forth concisely and under distinct heads the grounds of objections to the order, decision or determination appealed

from without argument or narrative; and such grounds shall be numbered consecutively.”

And the proviso to r. 4 above quoted reads:

“Provided that the High Court may for any good and sufficient cause grant any person leave to appeal out of time. When any such leave is granted the High Court shall specify the date by which the appeal shall be lodged.”

It may therefore be argued that on the authorities cited the Rent Restriction Act and the rules made thereunder constitute a complete Code, thus precluding the application of the general provisions of the Limitation Act as submitted and canvassed by Mr. Tahir Ali.

Mr. N. S. Patel, for the appellant, who submitted that the general provisions of the Limitation Act would apply to the computation of time for filing an appeal under the Rent Restriction Act, argued, as is the case, that this has always been held to be so and that the general practice to date is to exclude the time for obtaining a certified copy of the judgment and order from the computation of the prescribed period. However long-lived and unbroken this practice is, now that it has been challenged, although as very rightly remarked by Mr. Patel, for the very first time, it does not absolve the court from considering the question, and if bound by authority, from ruling against the practice. As indicated earlier in this judgment, I would prefer to construe “affect” ejusdem generis with “alter”, but as authority appears to be against me on this, I am by no means persuaded that the Rent Restriction Act and the rules made thereunder constitute a complete Code so as to preclude the general provisions of the Limitation Act. To my mind, as an appeal cannot be lodged unless accompanied by a certified copy of the order, decision or determination appealed from, and as the memorandum of appeal “shall set forth concisely and under distinct heads the grounds of objections to the order, decision or determination appealed from”, which obviously cannot be prepared without recourse to the judgment on which the order, etc. is founded, it rebels against common sense and equity to hold that the time spent in obtaining a certified copy of the judgment, which may be and indeed often is, considerable, should not be excluded from the prescribed limitation period. Support for this view that the Rent Restriction Act and the rules made thereunder are not a complete Code so as to exclude the general provisions of the Limitation Act. can, I think, be had from the Rent Restriction Act itself, wherein in s. 11 (4) it is stated:

“The Chief Justice may make rules governing any such appeals to the High Court and providing for the taking of further evidence, the fees to be paid, the scale of costs of any such appeal, the procedure to be followed and the manner of notifying a Board or the parties of an appeal, and until any such rules are made and subject to any rules when made the provisions of the Indian Code of Civil Procedure shall apply as if the order, decision or determination of the Board was a decree of a court exercising original jurisdiction.”

I would therefore, and in fact do, hold that the general provisions of the Limitation Act do apply to appeals under the Rent Restriction Act. Even if I am wrong in so holding, I would not have the slightest hesitation in granting an extension of time for the appeal to be lodged in this instant case, as it is abundantly clear, as demonstrated, that the delay was not in any way due to any default on the part of the appellant, who acted with all possible expedition. I therefore ruled in favour of the appellant on the preliminary objection raised on behalf of the respondent, and held that the appeal was competent.

In her application in the prescribed form, the (appellant) landlord at para. 1 described the suit premises as:

“Commercial-residential building consisting of one shop-cum-two bedrooms, store, kitchen, bath, w.c., closed verandah, compound and compound wall.”

In para. 9 of the application she claimed arrears of rent in the sum of Shs. 2,200/- and one month’s rent of Shs. 200/- in lieu of notice, with interest thereon, etc., and at para. 10 the statement of facts is set out as follows:

“The applicant claims from the respondent a sum of Shs. 2,200/- being arrears of rent for eleven months from March 1, 1963 to January 31, 1964 at Shs. 200/- per month and Shs. 200/- being one month’s rent in lieu of notice, and interest thereon at 9 per cent. per annum from date of filing of this application till judgment and on decretal amount from date of decree till payment. The respondent has not paid the rent in spite of demand.”

It is also not irrelevant to note that in para. 6 it is stated that the rent of the premises on July 1, 1959, the prescribed date, was Shs. 250/- per month.

In his written statement of defence the respondent averred:

- “1. It is denied that the respondent was at any time a tenant of the applicant. This application is therefore incompetent and is liable to be dismissed with costs.
2. Without prejudice to above the respondent submits that one Mr. Makinda was the tenant of the applicant in respect of the premises in dispute. He left for Dar-es-Salaam leaving the respondent to look after the same. The respondent submits that he was neither the sub-tenant nor the assignee of the said tenant and is not personally responsible for payment of rent.
3. Without prejudice to above and as a further alternative, and only in case the Board is pleased to hold that the respondent is liable for payment of rent, the respondent submits that the major portion of the premises were occupied by the Domestic and Hotel Workers’ Union while the respondent occupied only the two rear rooms. The respondent, therefore, prays that the Board be pleased to fix the standard rent of the said two rooms and require the respondent to pay only for the said two rooms.”

In reply to the written statement of defence the applicant stated:

- “(1) As to para. 1 of the defence, the applicant still maintains that at all the material times, the respondent was a tenant of the applicant.
- (2) The applicant denies para. 2 of the defence and reiterates the above paragraph.
- (3) (a) Regarding para. 3 of the defence, the applicant states that all the facts of the application are not specifically denied by the respondent and the defence is evasive. In the circumstances, all the facts of the application are deemed to be admitted and judgment for the applicant as prayed be entered against the respondent.
- (b) Further the applicant states that as far as the applicant is concerned, the respondent was the tenant for all the material times and he is responsible for the rent claimed. The applicant had no other tenant for the material time besides the respondent.
- (c) The premises were let on July 1, 1959 at Shs. 250/- per month to one Mr. Ebrahim Hakimjee and the said facts are not denied. In the

circumstances, under the Act, the standard rent is Shs. 250/- per month.”

At the hearing before the Board, Mr. Tahir Ali, who appeared for the respondent, as he has done at this appeal, withdrew the respondent’s allegation denying the tenancy, and raised as preliminary points that the Board had no jurisdiction over the commercial part of the premises and further that the Board had no jurisdiction in respect of rent prior to January 1, 1964, on which date the Rent Restriction Act (Cap. 497, Supp. 62) was applied to Morogoro by General Notice No. 2923 of 1963.

Before the Board four issues were framed as follows:

1. What sort of premises?
2. Has the Board jurisdiction over the whole of the premises?
3. Has it jurisdiction over rent owing before January 1, 1964?
4. What is payable?

The evidence before the Board was limited to that of the applicant’s husband, who represented her by power of attorney, and the respondent. The former gave evidence to the effect that the premises as a whole had originally been let at Shs. 250/- per month, which was subsequently increased to Shs. 350/- per month. In October, 1962 the premises were rented to a Mr. Makinda at a monthly rent of Shs. 200/- and the tenant sub-let the shop portion of the premises to the Domestic and Hotel Workers’ Union, from whom he collected rent. On January 1, 1963 the premises as a whole were let out to the respondent as, and I quote, “one unit to be used residentially. It was understood between us that if he wanted to use it commercially he should notify the owner”. During the course of his evidence the landlord’s husband produced two letters from the respondent, which were put in by consent as Exhibits “A” and “B”, admitting *inter alia* that the rent was in arrears. The applicant’s husband in his evidence testified as to the amount the rent had got into arrear, and stated that in January, 1964 the respondent vacated the premises without giving notice or informing him, and moved to Dar-es-Salaam. He thereupon instructed his advocates to demand the rent, which was in arrear from March, 1963 to January 31, 1964 and a further sum of Shs. 200/- in lieu of notice. The respondent in his evidence denied that he had ever rented the premises from the landlord or entered into any agreement with her or her husband. He asserted that his predecessor in occupation, Mr. Makinda, was a friend of his, and when he was vacating the premises informed him that he could occupy the two rooms he himself had been occupying, and he thereupon went into occupation as from January 1, 1963, at that time not even knowing of the existence of the landlord. At the time of his going into occupation of these two rooms the remainder of the premises was occupied by the Domestic and Hotel Workers’ Union, from whom he collected rent totalling Shs. 400/- which he handed to Mr. Makinda, whom he considered to be the landlord. He asserted that he did not see the applicant, or rather her husband, until he had been in occupation of the premises for four months. He further stated that his predecessor, from whom he took over the premises, Mr. Makinda, informed him that he was supposed to pay Shs. 200/- per month for the whole of the premises, but he was to negotiate a reduction with the landlord. He also stated that Mr. Makinda left his furniture in the house and that he (the respondent) had never treated the Union as his tenants.

On the four issues as framed the Board held, and I will retain the sequence as set out in the issues, that the premises as a whole, the subject matter of the case, were neither residential nor commercial, but found that they in fact constituted two distinct entities, one of which, that occupied by the respondent personally, being residential premises, whilst the other, in occupation of the

Domestic and Hotel Workers' Union, was commercial. On the second issue the Board found that it had no jurisdiction to deal with the commercial part of the premises – that occupied by the Union – but only with the residential portion which had been occupied by the respondent. The Board further found that it had jurisdiction to deal with arrears of rent accrued prior to January 1, 1964, on which date the Rent Restriction Act was applied to Morogoro. And on the fourth issue the Board awarded the applicant landlord Shs. 990/- being arrears of rent for eleven months at Shs. 90/- per month, and half her costs and interest on the award at 7 per cent. It is from this order of the Board that this appeal and cross-objection have been brought.

In the memorandum of appeal the appellant asserts:

- “1. The Board erred and misdirected itself in holding:
 - (a) that only two back rooms of the application premises come within its jurisdiction and it will, therefore, continue its attention for that portion of the premises;
 - (b) that it has no jurisdiction over the entire premises and will limit its attention to the part of the premises that it seems competent to deal with;
 - (c) that it is competent to deal with a claim in respect of rent from March 1, 1963 to January 31, 1964 but only in respect of the two rooms at the back with the conveniences and that, if the rent in respect of other portion of the premises is owing, there would be practically nothing for it to do.
2. The Board further erred and misdirected itself:
 - (i) in assessing the standard rent for two rooms only;
 - (ii) in allowing Shs. 990/- as arrears of rent for two rooms only at Shs. 90/- per month from March, 1963 to January, 1964;
 - (iii) in not allowing additional rent for one more month as damages in lieu of notice to quit;
 - (iv) in allowing to the appellant half the costs of the application only.
3. The Board misdirected [itself] in interpreting s. 2 (2) of the Rent Restriction Act 1962.
4. The Board should have held:
 - (i) that the application premises were a dwelling house;
 - (ii) that the whole of the application premises comes within its jurisdiction;
 - (iii) that it is competent to deal with the whole of the applicant's claim for rent;
 - (iv) that s. 2 (2) of the Rent Restriction Act includes and does not exclude the user of the dwelling house for residential-cum-business purposes;
 - (v) that the standard rent of the premises was Shs. 250/- per month;
 - (vi) that the applicant was entitled to his whole claim of Shs. 2,400/- being Shs. 2,200/- for the arrears of rent for eleven months from March 1, 1963 to January 31, 1964 and Shs. 200/- as damages for one month's rent in lieu of notice and to Shs. 655/- being full cost of the application.”

And in the notice of cross-objection it is asserted that:

- “1. The Board erred in holding that it had jurisdiction to hear dispute relating to rent for the period prior to the Act being applied to Morogoro.

2. The Board erred in allowing to the appellant rent for eleven months. It should have allowed to the appellant rent for one month only.
3. The Board rightly held that the commercial part of the premises were not within its jurisdiction. The entire premises did not form subject matter of one tenancy.
4. The Board erred in not allowing proportionate costs to the respondent. Wherefore the respondent submits that the appeal be dismissed with costs and cross-objection be allowed with costs and the order of the Board be varied:
 - (i) by reducing the amount awarded to the appellant to Shs. 90/- only;
 - (ii) awarding costs of the proceedings before the Board to the respondent; and
 - (iii) such further relief as the Hon'ble Court deems fit to grant."

I propose to deal with the strictly factual position first.

It is abundantly clear that the Board was not particularly favourably impressed by either party, the learned chairman stating in his judgment:

"While much of the evidence of Valji Damani is easy to believe, the Board does not find it easy to swallow the whole hog. It is choking in parts – and in material parts at that. Nor does the Board find it easy to believe the entire evidence of the respondent. The Board is left with no alternative than to begin doing a good deal of sifting between the evidence given on both sides."

The Board found as a fact, despite the respondent's protestations to the contrary, that he was a tenant of the whole premises. As noted, the denial of any tenancy on the part of the respondent was withdrawn at the hearing before the Board, which found as a fact that the respondent became a tenant of the whole premises as from January 1, 1963. Without going into any great detail, in whatever manner the tenancy was initially created this finding of the Board is amply supported and justified by the evidence. It is sufficient to refer to a letter of the respondent addressed to the landlord and dated March 7, 1963, produced as Exhibit A, wherein he stated:

"I am sorry to delay your house rent. In fact circumstances made things a bit difficult for me. In the first place the chaps who occupy the front part of the building did not pay in January. I pressed them hard but they kept telling me come – go – come – go and so. On February 5 they had not paid and on February 6 I left for twenty-five days leave at Moshi. As I needed all the money I had for this leave I left a cheque for Shs. 100/- with Fazal Kassam, being my share. Well I returned on March 3 and only yesterday my tenants paid me Shs. 100/- for January!!! They are still sitting on February rent.

However, I have now paid a cheque for Shs. 300/- to Fazal Kassam being payment up to February 28. I am now left to chase the domestic chaps.

I have in mind to kick them out but I have not found a suitable tenant.

Best wishes. Will see you next time I visit Dar."

When this letter was put to the respondent in cross-examination he is recorded as saying "The fact is that the position was rather complicated" etc. Like the Board, I do not find the position complicated. It is abundantly clear, as indicated, that the respondent took over the tenancy of the whole premises. It is also abundantly clear, as found by the Board, that the respondent paid

rent for only two months, January and February, and as from March to January of the following year the rent was in arrear. The landlord was thus entitled to rent for the eleven months apart from any question of a month's rent in lieu of notice claimed.

Continuing with the factual aspect, it is also abundantly clear that when the respondent took over the lease of the premises as a whole, part of them were occupied by the Domestic and Hotel Workers' Union for use as offices, and the respondent went into occupation of the other part, which he used for residential purposes. On the issue as to whether the premises were a dwelling house or business premises the Board did not merely content itself with hearing the evidence of the parties, but also inspected the premises, and found as a fact that the two portions, one occupied by the respondent personally and the other by the Union, were physically divisible into separate entities, each being self-contained with its own means of entrance and exit. This finding is not disputed, but even so it is submitted on behalf of the appellant that the premises as a whole are what is popularly termed residential-cum-business premises, and so constitute a dwelling house within the meaning of the Rent Restriction Act 1962 as expressly provided for in s. 2 (2) of the Act, that:

"The application of this Act to any dwelling house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes";

which provision, incidentally, is not referred to in the judgment. Nor has any authority been cited in the judgment in support of the finding that the Board had no jurisdiction over the part occupied by the Union.

In arguing this appeal Mr. Patel cited, in fact relied on for his submission, a case of this court; that of *Habib Lalji Jetha and Others v. Akbar Datu Hirji and Others*, [1964] E.A. 689. In that case the Board concerned had directed itself (as quoted in the judgment of the court, *ibid.* at p. 691):

"There seems to be little to guide us as to what parts of a single structure might be separate entities. Presumably this is a question of fact depending upon the circumstances of the particular case. There is no similarity in the letting together of a shop in Independence Avenue and a house in Oyster Bay (an example put forward by counsel for the respondents) since they are not part of the same structure. No doubt the two shops which are let single and alone might be separate entities, but the five shops and five flats with which we are now concerned are very closely associated from the contractual point of view and are certainly part of the same structure. The counterpart lease we have seen has not one single provision which differentiates between the shop and the flat. Again, in our view, it makes no difference whether the flat is directly over the shop on the first floor or is on the second floor, since the means of access to the upper floors is the same and is in itself part of the same structure.

In the circumstances we feel unable to find that these particular five flats are separate entities from their five associated shops. We must conclude that s. 2 (2) of the Rent Restriction Act applies and standard rents must be fixed for the composite lettings of shops and flats in these applications."

After referring to the submissions on behalf of the appellant in that case that the English decisions relied on by the Board should not be followed, Sir Ralph Windham, C.J. (as he then was) in his judgment went on to say (*ibid.* at p. 692):

"I am, with respect, unable to accede to these submissions. Those English decisions which the Board cited and on which it relied were all decisions of the Court of Appeal. And while the decisions of that court are not strictly

binding upon this court, they are of strong persuasive authority, especially when they are concerned, as here, with interpreting a section in the English legislation, namely s. 3 (3) of the Rent and Mortgage Interest Restrictions Act 1939, whose relevant provision is in terms identical with that of s. 2 (2) of our Rent Restriction Act 1962. I am quite unable to hold that the test laid down by an inferior court in *Thompsonstone v. Simpson*, [1952] 1 All E.R. 431, which was rejected by the Court of Appeal, is so manifestly the more correct and common-sense one that it ought to be followed by this Court in spite of that rejection.

For the rest, I consider that the Board correctly applied to the premises the tests laid down by the Court of Appeal, and rightly held that, upon applying those tests, a residential flat and business premises, where as in the present case they are let under a single lease for a single rent without differentiation, and where they are both situated in the same building although communication from the one to the other entails passing along a passage or staircase not comprised in the subject-matter of that lease, then the two may properly be held to constitute one 'dwelling house' falling within the Rent Restriction Act 1962, by virtue of the provisions of s. 2 (2) of that Act."

With respect, I fully agree with the judgment and ruling of the learned Chief Justice, both as to the authority to be accorded to English cases in general and as to his finding in the specific case in particular that the premises constituted a dwelling house within the meaning of the Act. Even so this instant case can, to my mind, be distinguished. In that case each flat was let together with a shop in one letting to a single tenant for use as residential accommodation and business premises respectively, and they were in fact so used. In the case before us, before the respondent became the tenant of the premises as a whole, his predecessor, Mr. Makinda, had sub-let part of them to the Domestic and Hotel Workers' Union for use as offices. Thus, when the respondent became the tenant of the premises the portion occupied by the Union was being used as business premises. They were so used by the Union at the commencement and continuance of the respondent's tenancy, the respondent himself occupying the remainder of the premises for residential user. There has been thus, even before the commencement of the respondent's tenancy, a severance of the business part from the residential part of the premises. Turning again to the English authorities for assistance, there are cases to the point that such factors would constitute a severance. In *Gidden v. Mills*, [1925] 2 K.B. 713, where the tenant let off part of the premises as a garage whilst the other part was used as living accommodation, it was held, quoting from the judgment of Greer, J. (*ibid.* at p. 727):

"In my judgment by dividing the premises into two parts, one let as a dwelling-house, and the other retained for his own use as a garage, the defendant has lost the protection of the Act so far as the garage is concerned."

And in *Gee v. Hazleton and Others*, [1932] 1 K.B. 179, where, quoting from the headnote:

"The statutory tenant of a dwelling-house and land granted a licence for seven years at an annual rent to a bill-posting company to erect an advertisement hoarding on part of the land. The company was granted free and uninterrupted access to 'the advertising position' for bill-posting, etc., purposes",

it was held, again quoting from the headnote:

"Held, that although this did not constitute the grant of a sub-lease, but of a licence only, the said part of the tenant's premises had ceased to be

within the protection of the Rent Restriction Act because used for business purposes by one other than the statutory tenant of the whole, and that the landlord was entitled to possession of that part.”

The English cases go even further, it being held in *Phillips v. Haliahan*, [1925] 1 K.B. 756, that where the landlord of premises which consisted of a shop on the ground floor with a dwelling house above, let both portions to a tenant, but under separate lettings, the shop portion of the premises while so let separately was not within the protection of the Rent Act. It is not however necessary in the case before us to go to such extremes, as the office portion of the premises was let out to and occupied by the Union whilst the remaining portion was occupied by the predecessor of the respondent. It should hardly be necessary to add that the premises having been thus severed during the tenancy of the respondent's predecessor they remained so separate and distinct at the commencement and continuance of the respondent's tenancy. The Board's finding that it had no jurisdiction over the part of the premises let to the Union is accordingly upheld.

The Board further determined the standard rent of the portion occupied by the respondent at Shs. 90/- a month. Such determination, that is, the figure at which the standard rent was determined, has not been challenged by either party and accordingly stands undisturbed.

With regard to the appeal against the Board's disallowing the appellant's claim for a month's rent in lieu of notice, at the hearing of this appeal Mr. Patel abandoned such claim, apparently on the ground that the premises were transferred to another tenant, from whom such rent has been or will be recovered.

To turn to the cross-objection, that is against the finding of the Board that it had jurisdiction to award arrears of rent accruing prior to the application of the Rent Restriction Act to Morogoro; in his judgment the learned chairman stated:

“The Board holds that if the Act intended limiting the rent to be dealt with only to rent owing as from the operative date of the Act in a given area it would state so. As it is, it appears to the Board to make nonsense of the suggestion that only rent owing as from January 1, 1964 can be adjudicated upon by the Board. The Board is of the view that this is not the intention of Parliament and consider itself competent to deal with rent owing from a date before January 1, 1964, in so long as the claim is brought before the Board on a date as from or after January 1, 1964. If that were not so, if the Board were to sit on the 4th, 8th, 10th, 12th or later in January, 1964, as it has every lawful right to do, there would be practically nothing for it to do.

The Board therefore considers itself competent to deal with a claim in respect of rent from March 1, 1963 to January 31, 1964 but only in respect of the two rooms at the back with the conveniences. If rent in respect of the other portion of the premises is owing, the applicant must seek other means of recovering same.”

With respect, from a practical common-sense point of view I am in perfect agreement with the conclusion of the Board, as it would in effect be ridiculous to hold that the Board's jurisdiction is limited to adjudicating only in respect of arrears of rent for the month of January, but it had no jurisdiction to adjudicate on the arrears accrued before as the Rent Restriction Act had not then been applied to Morogoro. The learned chairman has not, however, quoted any authority to the point, and it must be conceded at once that there would appear to be authority to the contrary. In *Re Hale's Patent*, [1920] 2 Ch. 377, wherein the plaintiff had claimed from the Treasury in respect of inventions patented

by him and used by the War Department on the claim being resisted by the Treasury, the plaintiff applied that the dispute be referred to the Royal Commission set up under the then existing legislation. Before the dispute, the proceedings of which had already been set in motion, came before the Tribunal, the Patents and Designs Act 1919 came into force, repealing the old Act and *inter alia* setting up the High Court as the forum for such disputes. It was held in that case that as the new Act had superseded the old, the plaintiff had no recourse to the Royal Commission but must file his suit in the High Court. It is on this case that Mr. Tahir Ali relies as his authority for his contention that the Board had no jurisdiction in respect of rent prior to January 1, 1964. Mr. Patel, however, has sought to distinguish that case from this instant case in that in the English case the new Act not only changed the forum but also affected the substantive rights of the parties, whereas in our case it was simply a question of procedure; that is, a change of tribunal. With respect, the Rent Restriction Act not merely laid down a new procedure but considerably affected the rights of tenants vis-à-vis their landlords. Thus, they are granted protection of tenancy, the right of ejectment being strictly limited to certain well defined situations, and the maximum rent in respect of premises to which the Act applies is specifically laid down. To refer to authorities nearer home, in a judgment of this court in *Suleman Ibrahim v. Awadh Said*, [1963] E.A. 179, where a landlord had instituted proceedings for possession in the High Court before the coming into operation of the Act, but the suit did not come up for hearing until after the Act had come into force, it was held, quoting from the headnote:

“Held:

- (i) as there had been no order of the Rent Restriction Board under s. 7 (1) (s) of the Act granting leave to the plaintiff to bring his proceedings for recovery of possession in the court, the High Court had no power to entertain the proceedings (*Valji Keshav Oza v. C. P. Jani & Sons*, [1957] E.A. 184 (Z), and *Gangabai Harji v. Bhoja Keshav*, [1957] E.A. 304 (T) applied).
- (ii) a right to have one's rights determined before one tribunal rather than before another is not of itself such a right as must be presumed to have been preserved by any general rule of interpretation regarding the preservation of existing rights, nor by any statutory provision which does not expressly preserve such a right.
- (iii) section 10 (2) (e) of the Interpretation and General Clauses Ordinance did not have the effect of saving the jurisdiction of the High Court from the express provisions of the Rent Restriction Act.”

And the proceedings were transferred to the Rent Restriction Board. Mr. Tahir Ali, however, has sought to distinguish this case on the grounds that it was concerned with possession whereas our case deals with arrears of rent. With respect, I see no good reason for so distinguishing, and likewise, I see no good reason for following the English case even if it cannot be distinguished. The ruling of the Board that it had jurisdiction to deal with arrears of rent accruing prior to the coming into force of the Act is accordingly upheld.

In the result, both the appeal and the cross-objection are dismissed.

With regard to costs, I incline to the view that the most equitable course would be to make no order as to costs, and would leave it at that. But I am prepared to hear learned counsel on this issue should they wish to be heard in opposition.

Appeal and cross-objection dismissed.

For the appellant:

NS Patel

NS Patel, Dar-es-Salaam

For the respondent:

Tahir Ali

Tahir Ali & Co, Dar-es-Salaam

Lokoya v Uganda
[1968] 1 EA 332 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	17 April 1968
Case Number:	8/1968 (58/68)
Before:	Sir Charles Newbold P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda at Gulu – Dickson, J

[1] Criminal Law – Evidence – Dying declaration – Made by deceased through interpreter – Interpreter not called – Evidence to be rejected as hearsay.

[2] Criminal Law – Murder – Malice aforethought – Burden on prosecution to prove – Conviction of manslaughter substituted.

Editor’s Summary

The appellant was convicted of murder. The killing occurred at night and the evidence was confused, but it appeared that the deceased had died from spear wounds inflicted on him by the appellant after an alarm had been raised. Part of the evidence at the trial consisted of two dying declarations made by the deceased to a police officer through an interpreter. The police officer gave evidence as to these declarations, but the interpreter did not. On appeal:

Held –

- (i) the dying declarations must be rejected as hearsay (*R. v. Gutosi s/o Wamagale* (1) and *R. v. Abusolome Nankome* (2) applied);
- (ii) the burden on the prosecution of proving malice aforethought was not discharged.

Appeal allowed. Conviction of manslaughter substituted.

Cases referred to in judgment:

- (1) *R. v. Gutosi s/o Wamagale* (1947), 14 E.A.C.A. 117.
- (2) *R. v. Abusolome Nankome* (1947), 14 E.A.C.A. 119.

Judgment

Spry JA: delivered the following considered reasons for the judgment of the court: The appellant, Mariko Lukoya, was convicted of the murder of one Paulo Localamoi and sentenced to death. He appealed to this court. We heard his appeal on March 7, 1968, when we allowed the appeal, quashed the conviction and set aside the sentence of death, substituted a conviction of manslaughter and imposed a sentence of six years' imprisonment. We now give our reasons.

It appears that on the evening of November 21, 1966, a meeting was held in the compound of one Alfonsio Odwar, at which more than ten persons were present, including the appellant and one Jekeria Oderi. A path runs through the compound, and while the meeting was going on, a stranger was observed passing along the path in the direction of the homes of the appellant and Jekeria. He is said to have been carrying a light cane, less than two feet long. By this time, the appellant had left the meeting. Jekeria spoke to the stranger but received no reply. Jekeria and Alfonsio followed the stranger, who began to run and Jekeria then raised an alarm. Some cattle belonging to Jekeria had been stolen that day and he thought the stranger might be the thief. According to the witnesses, it seems that neither Jekeria nor Alfonsio had any weapon. Other people from the meeting followed.

It seems to have been dark, although the evidence on this is contradictory, and there was probably a good deal of confusion. Much of the evidence is

unsatisfactory and witnesses seem to have described what they thought must have happened rather than what they had actually seen. The next fact that was established is that one Nason Yongo, who had also been at the meeting, arrived at a point about thirty yards from the compound, where he found the stranger lying on the ground “covered with blood” and Jekeria Alfonsio and the appellant near him, the appellant having a spear in his hand. He asked the appellant who had speared the stranger and the appellant replied “I speared him”. Shortly afterwards, another witness, Olebe Tope, met the appellant about twenty yards away, when the appellant said that he had killed a man. The witness did not see the appellant carrying anything at that stage.

In the meanwhile, the stranger had sprung up and ran away. He was chased by the people present but escaped. It appears that he was found alive next morning, though there is no evidence when or where. He was taken to a dispensary, where he died at about 6.30 p.m. Before he died, he made two statements to a police officer, one on the way to, and one at, the dispensary; the latter was recorded by the police officer. The deceased spoke in the Digo language, which was not known to the police officer, and the deceased’s brother Tobielo Localamoi acted as interpreter.

The appellant made various statements. At the time of his arrest, he said that an alarm was sounded, there were cries of “thief”, he ran there and speared a man. Later, he made a cautioned statement in which he said:

“I admit the charge. I killed him. I was coming from local dance when I heard an alarm and went there to answer it, there I found many people chasing a person who was said to be a thief and I spear him.”

He also took a party of police officers to a house where a spear was found.

At the trial, the appellant made a lengthy unsworn statement. Much of it tallied with what has already been related. Part, however, was new. He said that he left his house on hearing the alarm, carrying a spear and two hoes. Passing the house of a neighbour, he was told that people were chasing a cattle thief. There he met a man running and called on him to stop. Instead, the man threw a spear at him but missed. He picked up the spear and, as the man rushed towards him, thrust it at him. He said that he did not know what part of the body he struck. The man then ran away. He concluded by saying that he told the people who had answered the alarm that the man had nearly killed him.

The learned judge summed up fully to the assessors and particularly drew their attention to the possibilities of self-defence and provocation raised by the appellant’s unsworn statement. One of the two assessors disbelieved that statement, rejected both self-defence and provocation and advised that the appellant should be found guilty of murder. The other thought he should be given the benefit of the doubt and found guilty of manslaughter only.

The learned judge reviewed the evidence in a long and careful judgment. He found that the evidence establishing beyond doubt that the deceased had died as the result of being speared by the appellant. He held that the appellant’s unsworn statement was “a tissue of lies” and for this reason he rejected the defence of provocation. In arriving at that conclusion, the learned judge was clearly influenced first, by the evidence that the deceased had not been carrying a spear and, secondly, by the contents of the dying declarations.

It was unfortunate that the learned judge apparently overlooked the fact that the evidence of both dying declarations was given by a person who was unable to understand the words spoken by the deceased and had therefore to employ an interpreter. That interpreter was called as a witness to give evidence of identification but no questions were put to him regarding the dying declarations or his

interpretation. The result of this unfortunate oversight is that the evidence

regarding the dying declarations must be wholly rejected as being hearsay: *R. v. Gutosi s/o Wamagale* (1947), 14 E.A.C.A. 117; *R. v. Abusolome Nankome* (1947), 14 E.A.C.A. 119.

Mr. Pandit, for the appellant, submitted that the medical evidence left a doubt whether it was the appellant who had inflicted the fatal wound. The evidence showed that the deceased died at 6.30 p.m. on November 22. The doctor said that the injuries from which the deceased died had been inflicted “up to ten hours” before death. If this was correct, the injuries had been inflicted not earlier than 8.30 a.m. on November 22, which was long after the appellant was alleged to have speared the deceased. With respect, we are not persuaded by this argument. We think the doctor may have under-estimated the interval of time between the infliction of the injuries and death. The appellant himself said to two witnesses that he had killed the stranger, and he was seen, with his spear, near the deceased who was lying on the ground “covered with blood”. We do not think there can be any doubt that the injuries the deceased had then sustained were those from which he died. It will be recalled that after the stabbing, the deceased escaped from his pursuers and it must be inferred that the people who eventually found him and took him to the dispensary were sympathetic towards him.

The only question of real substance is whether malice aforethought was proved. Mr. Pandit argued that there must have been some provocation, otherwise the fact of the killing would have been incredible. There, we cannot agree. The wanton killing of a suspected thief is all too common in East Africa. The difficulty as we see it lies in the lack of evidence as to what happened immediately before and at the moment of the killing. There is only the appellant’s unsworn statement, which the learned judge did not believe. It is a curious and unexplained fact that neither Alfonsio nor Jekeria was called as a witness, although on the face of the evidence they must have known what happened. The appellant was not one of those who pursued the deceased from Alfonsio’s compound. We know that the killing occurred at night, that the appellant was answering an alarm, and that he stabbed the deceased, but we do not know the circumstances of their meeting. The burden was on the prosecution to prove malice aforethought and that burden has not been discharged.

As that burden has not been discharged the conviction of murder cannot stand. On the other hand, we were in no doubt that it was the appellant who killed the deceased and that the killing was unlawful. We therefore substituted a conviction of manslaughter.

Order accordingly.

For the appellant:

SV Pandit

SV Pandit, Kampala

For the respondent:

AM Khan (State Attorney, Uganda)

Attorney-General, Uganda

Division: Court of Appeal at Nairobi
Date of judgment: 7 May 1968
Case Number: 35/1967 (73/68)
Before: Sir Charles Newbold P, Sir Clement de Lestang V-P and Spry JA
Sourced by: LawAfrica
Appeal from: High Court of Kenya – Rudd, J

[1] *Costs – Taxation – Instructions and getting-up fees – Counter-claim – Whether instructions fee on successful counter-claim to be allowed under item 1 (f) or item 1 (l) of Schedule 6 of the Remuneration of Advocates Order 1962. (K.) – General principles of taxation on counter-claim.*

[2] *Costs – Counter-claim – Instructions fee on – Principles for taxation of – Whether taxable under item 1 (f) or 1 (l) of Schedule 6 of Remuneration of Advocates Order 1962.*

Editor’s Summary

The appellant made a counter-claim in a suit brought against him by the respondents. The counter-claim succeeded with costs. When the costs came to be taxed the Taxing Master dealt with them under item 1 (l) and not item 1 (f) of Schedule 6 of the Remuneration of Advocates Order 1962. The appellant appealed to the High Court against this, and, having failed (see [1967] E.A. 423), appealed again to the Court of Appeal.

Held –

- (i) (Newbold, P. dubitante) a counter-claim is not a “proceeding commenced by plaintiff” and could not be within item 1 (f);
- (ii) the amount of costs on a counter-claim is not to be determined as if it was a separate action but is to be determined on the basis that only the additional costs resulting from the counter-claim are to come within the order of the court allowing the defendant the costs of the counter-claim (*Medway Oil and Storage Co. Ltd. v. Continental Contractors Ltd.* (1) adopted).

Appeal dismissed.

Cases referred to in judgment:

- (1) *Medway Oil and Storage Co. Ltd. v. Continental Contractors Ltd.*, [1929] A.C. 88.
- (2) *Pioneer Investment Trust v. Amarchand* (1968), p. 386, post.

May 7, 1968. The following ex tempore judgments were delivered:

Judgment

Spry JA: This appeal arises out of a suit in which the present respondent sought to recover the purchase

price paid by him for certain land in a transaction which became void for non-compliance with Land Control regulations. The claim was resisted by the present appellants who included in their defence a counter-claim asking that if the respondent were successful an order should be made for possession in favour of the appellants and they also claimed mesne profits and damages. In the event the respondent was successful and obtained judgment for the amount of the purchase money, but, and this was largely consequential, the respondents succeeded on their counter-claim and obtained an order for possession. They also obtained an order for damages in view of the respondents possession of the land having been illegal, but taking all the factors into account these were assessed at a more or less nominal figure of Shs. 1,000/-. The respondent was given the costs of the suit and the appellants the cost of the counter-claim.

When the costs of the counter-claim came to be considered by the Taxing Master the question was raised whether the appellants were entitled to an instruction fee under para. (f) of item (1) of Sched. 6 of the Advocates Remuneration Order or under para. (l) of that item. There was also the question as to the getting-up fee but there is no need to deal with that in any detail because it appears to be agreed that this should be one-quarter of the instruction fee, that is the minimum provided by the Order and we are therefore only concerned with the instruction fee. Rule (f) relates to instruction fees to “sue or defend any other proceedings commenced by plaintiff” or originated in certain other manners. The reference to other proceedings follows certain specific actions which are not relevant to these proceedings. Paragraph (l) refers to instruction fees to sue or defend in any case not otherwise provided for.

It appears to me that the essence of this appeal is what is meant by the words “commenced by plaintiff”. Mr. Mackie-Robertson, for the appellants, has argued that because a counter-claim has much the character of a cross-action it should be regarded for this purpose as being commenced by a plaintiff. With respect, I cannot accept that argument. I agree entirely that a counter-claim has many of the attributes and may in many ways be equated to a cross-action but it is not one. Indeed, the procedure is expressly set up so as to avoid the necessity for cross-actions. I would therefore, on the plain interpretation of para. (f), dismiss this appeal.

We have heard considerable arguments on what may be termed the proper principles behind the taxation of costs and as regards those I would only say that the general principles, as I understand them, seem to me to confirm the strict interpretation of para. (f). I would therefore dismiss this appeal.

Sir Clement De Lestang V-P: I agree and have very little to add.

I appreciate fully Mr. Mackie-Robertson’s arguments that our rules, as for that matter the English rules from which they are derived, attribute the same effect to a counter-claim as to a cross suit but this falls short of making a counter-claim a plaintiff. To come within para. (f) of item (1) of Sched. 6 of the Remuneration of Advocates Order, a counter-claim would have to be a proceeding commenced by plaintiff and for the reasons which have been given by Rudd, J. in the court below and by Mr. Nazareth in his argument before us, I am of opinion that a counter-claim is not commenced by a plaintiff. A plaintiff has to conform with O. 7 of the Rules while a counter-claim is governed by O. 8. I might also add that the inclusion of a counter-claim in cl. (f) would prevent the application of the principle which is well-established for the taxation of a counter-claim, especially in the circumstances of this case.

For these reasons I would also dismiss this appeal.

Sir Charles Newbold P: I agree.

The issue on this appeal is dependent upon the very simply stated question as to whether the word “plaintiff” in item 1 (f) of Sched. 6 of the Advocates Remuneration Order 1962, includes a counter-claim. If it does, then clearly the Taxing Master was right in approving as the instruction fee the minimum set out in the item for the reason that he had no discretion to award any smaller sum. If it does not, then the only other item under which the order of this court giving to the defendant, who was successful on his counter-claim, the costs of that counter-claim could have those costs quantified is item 1 (l). For myself I find more difficulty in coming to the conclusion that the word “plaintiff” does not include counter-claim than my brethren. In my view the word “plaintiff” should normally include counter-claim unless there is good reason to the

contrary. The reason for this view is, as has been urged by Mr. Mackie-Robertson, that a counter-claim is merely a type of procedure devised to avoid the necessity to two separate actions which would then be consolidated. In my view the very provisions of O. 8, which specifically speak of equating the one to the other, make it clear that for all practical purposes a counter-claim is to be regarded as a plaint; and from this it follows that where legislation uses the word “plaint” with no other provision which would include a counter-claim, then that word should normally be construed as including the word counter-claim.

All legislation, however, has to be construed in the particular context. The context in which this word “plaint” appears is an Order dealing with the amount, the quantum of costs, to be awarded when an order for costs has been made by a court. Therefore, in my view, that word has to be construed having regard to the general principles followed by the courts in relation to the award of costs. In England, in a case which has been referred to as the *Medway* case (*Medway Oil and Storage Co. Ltd. v. Continental Contractors Ltd.*, [1929] A.C. 88), it has been held that if there is a counter-claim then the amount of costs to be given on that counter-claim, where an order is made for the defendant who has counter-claimed to get his costs on the counter-claim, is not to be determined as if it were a separate action but is to be determined on the basis that only the additional costs resulting from the counter-claim are to come within the order of the court allowing the defendant the costs of the counter-claim.

That principle was considered recently by this Court in a case relating to appeal and cross-appeal and not to plaint and counter-claim, but the reasons for the decision are precisely the same. This Court, in the case of *Pioneer Investment Trust v. Amarchand* (1968), p. 386, post, dismissed a reference from a decision of a single judge of this Court where he held, equating the position of plaint and counter-claim with that of appeal and cross-appeal, that on a cross-appeal only such additional costs as arose from the cross-appeal are to be given to the successful cross-appellant. In effect, therefore, this Court has adopted the principle set out originally in the *Medway* case, *supra*, which is that on a counter-claim all the successful party, who has been ordered to get his costs on the counter-claim, can obtain are those costs which arose purely by reason of the counter-claim and that he is not to be entitled to obtain his costs as if the counter-claim were a separate action.

Now it seems to me that, while normally the word “plaint” should be construed to include counter-claim, it would be wrong to do so in the particular circumstances of this case. The effect of doing so would be to grant to the defendant who counter-claimed his instruction fees on precisely the same basis as if the counter-claim were a separate action; but as I have already pointed out, to do so would be running counter to the decisions in England and the decision in Kenya which has applied the principle of the English decision. While generally I should accept Mr. Mackie-Robertson’s submissions that the word “plaint” should include another type of proceedings which, though it is not a plaint is, for all practical purposes in other circumstances equated to a plaint, in the light of the particular provision in which this word comes and in these particular circumstances the courts should not enlarge the word “plaint” to include counter-claim.

I would like here to say that these considerations obviously influenced the trial judge, for he said these words in relation to the provisions of the *Medway* rule:

“This is an eminently fair and reasonable rule but it is not consistent with the Remuneration of Advocates Order 1962, if the matter is governed by item 1 (f) thereof.”

I agree with the judge. It is for that reason that I agree with my brethren that this appeal be dismissed.

The appeal accordingly is dismissed.

Appeal dismissed with costs with a certificate for two advocates.

For the appellant:

JA Mackie-Robertson, QC and AE Hunter

Daly and Figgis, Nairobi

For the respondents:

JM Nazareth, QC and US Kalsi

US Kalsi, Nairobi

Sargent v Gautama [1968] 1 EA 338 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	9 May 1968
Case Number:	47/1967 (75/68)
Before:	Sir Clement de Lestang V-P, Duffus and Spry JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Miller, J

[1] *Civil Practice and Procedure – Interpleader proceedings – Requirements for – Money paid to advocate as part of abortive terms for settlement of action – Suit brought against advocate by one of several claimants – Whether interpleader proceedings by advocate proper – Civil Procedure Act, s. 58; Civil Procedure (Revised) Rules 1948, O. 33.*

[2] *Costs – Interpleader proceedings – Principles – Whether costs to be reserved.*

[3] *Executors and Administrators – One of two executors contesting claim – Other executor not desiring to contest it – Whether both should be joined in proceedings – Interpleader application.*

Editor's Summary

The appellant was plaintiff in a suit. In 1961 there was a purported settlement of that suit as part of which a sum of Shs. 100,000/- was paid to the respondent, who was one of the appellant's advocates. The payment was made by one of the other parties to the suit, Rashid, by a cheque drawn by a company, Farouq Investments Limited, of which he was managing director. On the same day on which payment was made a dispute arose as to the terms of the purported settlement; and apparently also as to the

conditions under which the money has been paid to the respondent. Eventually, in 1966, after much correspondence between the parties, the appellant finally brought a suit against the respondent claiming the money, which in the meantime had also been claimed by one Bashir who was one of the two executors of the estate of Rashid (who had died) and also by Farouq Investments Limited. The respondent promptly brought this interpleader application. It was granted by the High Court, which also relieved the respondent from defending the suit brought against him by the appellant and ordered his costs to be paid by Farouq Investments Limited and Bashir. The appellant appealed and Farouq Investments Limited cross-appealed. The appellant argued, *inter alia*, that the application was incompetent because there were no “adverse” claims, the money having been paid to the respondent as the advocate and agent of the appellant so that only the appellant could have a valid claim to it. Farouq Investments Limited contended, *inter alia*, that its claim was not for the same but for an equivalent sum of money, and

that it was not “adverse” to that of the appellant, because they were not alleging the same obligation by the respondent; and challenged the removal of the respondent as a defendant and the order for costs.

Held –

- (a) this was a proper case for interpleader proceedings, there being adverse claims to the same sum of money by the different claimants and the other requirements of s. 58 of the Civil Procedure Act and of O. 33, r. 2 of the Civil Procedure (Revised) Rules being fulfilled; but
- (b) the order of the court below should be modified because
 - (i) the respondent should not have been removed from the suit as a defendant, there being an issue to be decided subsequently about his possible liability to pay interest, and also an issue about costs,
 - (ii) all the legal representatives of the estate of Bashir should be joined,
 - (iii) the costs should have been reserved,
 - (iv) an issue should be settled.

Observations as to interpleader generally.

Appeal allowed in part, appellant to pay two-thirds of respondent’s costs. Cross-appeal allowed in part, with no order as to costs. Order of High Court upheld with modifications.

Cases referred to in judgment:

- (1) *Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q.B. 546.
- (2) *Attenborough v. London and St. Katharine’s Dock Company* (1878), 3 C.P.D. 450.

May 9, 1968. The following considered judgments were read:

Judgment

Duffus JA: The relevant facts in this case started in 1961 with a purported settlement between certain of the parties in a civil action then pending in the High Court. The appellant in this action was also the plaintiff in that case and the respondent acted as one of his advocates. Under the terms of that settlement £5,000 was paid on July 27, 1961, to the respondent as the appellant’s advocate. This amount was paid as the result of the first paragraph of a document drawn up at the time of the settlement and which stated:

- “1. Condition precedent Rashid pays forthwith £5,000 unconditionally to Gautama in cash before 9.30 a.m. on July 27 to belong to Sargent and not to be refundable in any circumstances.”

This amount was paid by Sheikh Abdul Rashid who is the Rashid mentioned above, by a cheque from Messrs. Farouq Investments Limited. Later that same day and apparently during an adjournment of the trial of the civil action, which was the subject of the settlement and of this payment of £5,000, a dispute arose as to the terms of the settlement and apparently also as to the conditions under which the £5,000 had been paid to the respondent. It would appear as a result of this dispute the settlement was never effected and the amount of £5,000 was retained by the respondent.

Eventually after much correspondence over the fate of this £5,000 the appellant brought this action

against the respondent in June, 1966 claiming this amount. The respondent then brought this interpleader application averring that this amount is now being claimed by three various parties, that is, (1) the appellant,

(2) Farouq Investments Limited who paid the £5,000 by cheque, (3) one of the executors of Sheikh Abdul Rashid who died in 1963.

Section 58 of the Civil Procedure Act provides for the taking of interpleader proceedings as follows:

“Section 58. Where two or more persons claim adversely to one another the same debt, sum of money, or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants or where a suit dealing with the same subject-matter is pending may intervene by motion on notice in such suit for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself:

Provided that where any suit is pending in which the rights of all parties can be properly decided no such suit of interpleader shall be instituted.”

Order 33 of the Civil Procedure (Revised) Rules provides the procedure to be followed.

Various affidavits were filed by all the parties concerned together with copies of documentary exhibits. The application was heard and eventually the learned trial judge granted the application as follows:

“The court finds that this interpleader application is competent and grants it.

Order: – In accordance with O. 33, r. 4 that the claimants (1) Farouq Investments Limited and (2) Sheikh Mohamed Bashir be made defendants to the suit No. 587 of 1966 and further that Satish Gautama the present defendant be relieved of defending the action subject to his paying into court by the 2.8.67 the sum of Shs. 100,000/- the subject-matter of the said action.

Costs: – The applicant Gautama’s costs in these proceedings to be paid now and in any event to Gautama by Farouq Investments Limited and Sheikh Mohamed Bashir.

Costs on Queen’s Counsel’s scale.

Leave to appeal.”

The appellant, Edward Sargent, then appealed to this court and one of the claimants Farouq Investments Limited filed a cross-appeal. The other claimant Sheikh Mohamed Bashir appeared in person. Both the appellant and the claimant Farouq Investments Limited attacked the interpleader order and asked that it be set aside. The claimant Bashir supported the order but it is to be noted that the appellant and both the claimants all still very much press their respective claims to the £5,000.

An interpleader order is a matter in the discretion of the court. The essentials as set out under s. 58 of the Civil Procedure Act are that there are two or more persons claiming the same debt or sum of money from another person who claims no interest therein save for any charges or costs. The proceedings may be instituted in a pending suit, as in this case, and the only limitations to the court’s power to grant the application are those set out in r. 2 of O. 33 of the Civil Procedure (Revised) Rules 1948 to the effect that the applicant must satisfy the court by affidavit or otherwise that:

- (a) the applicant claims no interest in the subject-matter in dispute other than charges or costs
- (b) there is no collusion between the applicant and any of the claimants

- (c) the applicant is willing to do or transfer the subject-matter into court or dispose of it as the court may direct.

The learned trial judge in granting the application for interpleader proceedings was satisfied that all these conditions were fulfilled and he ordered that the amount of the claim £5,000 be paid into court and we are informed that this has now been done. The law and procedure in Kenya is similar to that set out in O. 57 of the English Rules of the Supreme Court of 1883, and r. 2 of that order is similar to r. 2 of our O. 33. The following passage from the judgment of Smith, L.J. in the Court of Appeal in England in the case of *Ex parte Mersey Dock and Harbour Board* is of assistance ([1899] 1 Q.B. 546 at 551):

“... All the conditions mentioned in r. 2 exist in the present case. It is unnecessary to go through the other rules of the Order. Except as mentioned in r. 2, I cannot find any limitation on the power of a judge to grant relief by way of interpleader, except of course that he must be satisfied that under the circumstances of the case it is just and proper that relief should be granted. The learned judge has exercised his discretion as to the justice and propriety of granting the relief asked for under the circumstances of this case.”

I think this is the position in this case. The trial judge very fully considered all the facts before him and decided that this was a proper case for an interpleader proceedings.

I agree. There can be no doubt that each of the various claims will have to be carefully gone into by the trial judge before he can decide who is entitled to the £5,000. The merits of the various claims cannot be decided at this stage but this does appear to be a case in which the respondent should have the benefit of interpleader proceedings. It was suggested by Mr. Salter, for the appellant, that the appellant should not be deprived of a possible claim based on estoppel against the respondent who was at the material time acting as his advocate. I cannot see how this could arise on the facts before this court especially having regard to the fact that it was apparently admitted by the appellant in his defence in Civil Case No. 968 of 1963 that the £5,000 was a conditional payment to his advocate and that at some stage the respondent acting on the appellant's instructions attempted to return this amount to the advocates who were at that time acting for both Sheikh Abdul Rashid and Farouq Investments Limited. Mr. Khanna for the claimant Farouq Investments Limited in his submissions suggested that the respondent might be liable to pay this £5,000 both to the appellant and to Farouq Investments Limited but I can find no justification for this proposition. This appears to me as it did to the trial judge to be a genuine dispute as to who is now entitled to this amount of £5,000.

Both Mr. Salter and Mr. Khanna in their submissions laid much stress on the point that the judge had misdirected himself in holding that the respondent was a stakeholder. I am of the view that the learned judge was premature in making this finding, but what really matters at this stage is whether there are adverse claims within the meaning of s. 58. Mr. Khanna also submitted that the various claims were not adverse claims. I find no real merit in these submissions. The facts as set out in the various affidavits and documentary exhibits in my view undoubtedly show that there are adverse claims by the different claimants to the same sum of money, and the circumstances of this case are such as the provisions of s. 58 were intended to apply to.

Mr. Khanna in his submissions quite properly pointed out that the claimant Sheikh Mohamed Bashir is only one of the executors of the Estate of Sheikh Abdul Rashid and that the other executor does not apparently desire to contest the claim of Farouq Investments Limited to the £5,000. The Estate of Sheikh

Abdul Rashid does appear to have a claim requiring investigation. I agree that the order of the court should be that the legal personal representatives of the Estate of Sheikh Abdul Bashir should be joined as a party and not only one of his executors. If the dispute between the executors is not resolved this might have to be the subject of a separate application to the court.

There does, however, appear to be a separate issue on the question of the respondent's possible liability to pay interest, the appellant claims interest in this action, and there is also the further question as to the respondent's liability for costs. If any interest is due this may, especially in view of the fact that the £5,000 was in the respondent's hands for nearly five years before this action was brought, amount to a fairly substantial claim. This question of interest does not appear to have been fully argued or considered before the learned judge but it does arise and is claimed in this action and also in the draft issue which Mr. Khanna submitted in the course of his address. It should in my view have been dealt with in the interpleader order. There are English authorities to the effect that a claim for damages arising out of the issue can be separately dealt with after the interpleader has been settled (see *Attenborough v. London and St. Katharine's Dock Company* (1878), 3 C.P.D. 450 (C.A.) and *Ex parte Mersey Docks and Harbour Board*, [1899] 1 Q.B. 546).

It might have been more convenient to settle this issue in the interpleader trial itself but this may complicate the issue and there might be difficulties in procedure to enable the claimants to state their claim and also possible other difficulties such as the application of the Limitation Act, etc. When this question was brought to the attention of Mr. Mackie-Robertson of the advocates for the respondent he suggested that the parties may first argue out the question as to the entitlement of the £5,000, and then the successful party could, if he desires, proceed with his claim for interest. I agree that these interpleader proceedings should now only decide the entitlement to the £5,000, and that the appellant and the claimants should, after this has been decided, be left to pursue any claim for interest that they might consider they have against the respondent, the appellant in this action, and the claimants, by a separate action.

There remains the question of the costs of this application. The judge ordered that the respondent's costs be paid now and in any event by Farouq Investments Limited and Sheikh Mohamed Bashir. The learned judge has not given his reasons for this order which is made only against these two claimants and not against the appellant who also opposed the granting of the interpleader order. There would also be the question of the respondent's liability for costs. I am clearly of the view that the question of the costs of the interpleader application must be reserved and decided by the judge who tries the interpleader issue and who will be in a position to know all the facts and properly decide who should pay the costs.

The judge also ordered that the respondent be relieved from defending this action, but in the circumstances of this case I consider that the respondent should remain a defendant having regard to the claim for interest and on the question of his possible liability for the costs of the application. The advocates for the claimant, Farouq Investments Limited, and for the appellant, dealt with the question of the delay in the respondent's application to this court. I am of the view that there is not such a delay here as would justify our interfering with the exercise of the judge's discretion in ordering the interpleader proceedings, and the question as to whether there has been such delay as would justify an order for costs of the application against the respondent is, as I have said, a matter to be dealt with by the judge trying the interpleader issue.

Rule 4 sets out the order that may be made in interpleader proceedings and states:

- “4. If the claimants appear in pursuance of the summons, the court may order either that any claimant be made a defendant in any suit already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff and which defendant.”

The issue in these interpleader proceedings is simply: which of the claimants is now entitled to the £5,000? The learned judge decided that the claimants should be added as defendants in the action but in my view this would be a proper case for an issue to be settled.

I am, therefore, of the view that the judge's granting of the interpleader application should be upheld but that order will have to be amended to: (a) clearly set out the issues for decisions on the interpleader and provide for pleadings to be filed; (b) retain the respondent as a defendant for the purposes set out; (c) provide for a separate trial of the appellant's claim for interest if he should desire to continue with this claim; and (d) revoke its order for costs and reserve this for the decision of the judge trying the interpleader issue.

I would therefore make the following order:

The order of the High Court granting the interpleader application is upheld subject to the following modifications and alterations:

- (1) That an issue, that is to say, who is entitled to the Shs. 100,000/- deposited in court be tried between the claimants, viz., Edward Sargent, the Estate of Sheikh Abdul Rashid and Farouq Investments Limited;
- (2)
 - (a) That in the trial of this issue the appellant Sargent shall be the plaintiff and his plaint already filed in Civil Case No. 587 of 1966 will be his claim to the money in dispute with liberty to him to amend the same within fourteen days from today, the plaint or the amended plaint to be served on the other two claimants;
 - (b) That the other two claimants, viz. the Estate of Sheikh Abdul Rashid and Farouq Investments Limited shall be defendants in the suit and will file their respective claims and serve these on each other and on the plaintiff within two months of the service on them of the plaintiff's claim or such other time as the High Court may decide;
 - (c) That the plaintiff may file a reply to the defendant's claims within fifteen days of the service of the same on him and each defendant may file a reply to the other's claim within a like period;
 - (d) That the High Court may give any further directions necessary to carry out this order.
- (3) That the order for costs of the application for the interpleader is set aside and will be decided by the court trying the interpleader and that the respondent Gautama will remain on the record for this purpose, and for the purpose of the claim of interest made against him by the plaintiff. He will not be a party to the interpleader issue as set out at (1) above.
- (4) The claim for interest made by the plaintiff will await the decision of the interpleader proceedings with liberty for the respondent to file a defence thereto in due course.

The appeal and cross-appeal have been partly successful. The respondent has succeeded in having the interpleader order sustained but with considerable modifications. The modifications have not been made as the direct result of any of the appellant's grounds of appeal, but in the final result the appeal in this

matter was justified. In my view the most equitable order would be that the appellant should pay the respondent Gautama two-thirds of the respondent's costs in the appeal and I would allow a certificate for two advocates. The cross-appeal failed on the main issue but succeeded on the question of costs and on the settling of an issue. In these circumstances I would make no order as to the costs of the cross-appeal and I would also make no order as to the costs of the claimant Sheikh Mohamed Bashir.

Sir Clement De Lestang V-P: The circumstances giving rise to this appeal are briefly the following. In 1958, one Edward Sargent, as mortgagee and debenture holder, instituted proceedings in the High Court for the sale of a sisal estate (Civil Suit No. 481 of 1958). Among the defendants to the suit was one Sheikh Abdul Rashid (hereinafter referred to as Rashid) who claimed a charge on the property. Sargent was represented by Mr. Nazareth, Q.C. and Mr. Gautama, and I shall hereinafter refer to the latter as the applicant.

During the hearing of the suit an alleged agreement was arrived at during the night of July 26/27, 1961, cll. 1 and 15 of which only need to be referred to. They read:

“Clause 1. Condition precedent Rashid pays forthwith £5,000 unconditionally to Gautama in cash before 9.30 a.m. on the 27th July – to belong to Sargent and not to be refundable in any circumstances.

Clause 15. Transfers to Rashid's rights may be in the name of his nominee.”

This agreement, which has been described as “Heads of Agreement” was to be properly drawn up by Mr. Nazareth on the following day. Before 9.30 a.m. on July 27, Rashid handed over a cheque for Shs. 100,000/- at the applicant's office. The cheque was drawn by Farouq Investments Limited (hereinafter referred to as Farouq) of which Rashid was the managing director. This explains the form of the receipt for the cheque which, after stating that it was for the account of Edward Sargent, contains these words:

“Received with thanks from M/s Farouq Investments Limited per Abdul Rashid Sheikh . . . being deposit on account in terms of settlement in S. Ct. Case N. 481/58.”

Later that morning there was a meeting of all the parties to the agreement at the Queen's Hotel, during which certain amendments to the draft prepared by Mr. Nazareth were sought on the ground, as I understand it, that it did not express the true intention of the parties as agreed in the Heads of Agreement. Those amendments were not accepted by Sargent. It is suggested by Sargent that he claimed the money from the applicant before 9.30 a.m. on July 27 and that the applicant refused to pay it over to him on the ground that he, the applicant, had had instructions from Rashid not to do so. A statement to that effect indeed appears in a letter addressed by Sargent to the applicant on July 28. Although it is nowhere denied by the applicant the letter is not strictly evidence of its truth as it is not set out in an affidavit. In the same letter, however, Sargent purports to repudiate the alleged agreement though he is apparently prepared to honour it if the money is paid over to him by 2.0 p.m. on July 28.

There was thus at this early stage a dispute between the parties as to whether the draft prepared by Mr. Nazareth represented the true agreement of the parties and Rashid's attitude was that the money should not be paid over to Sargent unless he agreed to the amendment suggested at the Queen's Hotel meeting. At that time Rashid and Farouq, the latter apparently as nominee of Rashid, were pressing for the execution of the alleged agreement by Sargent

but to no avail. No further change took place until September, 1962, when the applicant was instructed by a firm of advocates acting for Sargent to pay the money over to Mr. Swaraj Singh, who was then apparently acting for Farouq. The applicant duly sent this cheque for the amount but it was not accepted and was returned to him. Some time in 1963 a suit for specific performance was, I understand, brought, I think, by Farouq against Sargent. That suit was later withdrawn although it would appear from the correspondence that Sargent was agreeable to perform what he considered to be the true agreement. Again a few years passed and it was not until June 1966 that Sargent brought the suit against the applicant wherein he claimed the money, plus interest from July 27, 1961. Meanwhile Rashid had died, leaving two executors to administer his estate. One of them intimated that he was prepared to relinquish any claim to the money while the other insisted in pursuing the claim and so informed the applicant. In these circumstances I do not think that it would be unfair on my part to say that from the moment the money was paid to the applicant disputes arose as to the conditions under which it should be paid out, that the parties changed their attitudes from time to time and that during the intervening years efforts were being made to settle their differences but without success until eventually the suit I have mentioned above was filed. The applicant then found himself besieged, so to speak, by three claimants, and he lost no time in moving the court below for an interpleader. The court below granted his application and made the following order:

- “1. That in accordance with O. 33, r. 4 the claimants (1) Farouq Investments Limited and (2) Sheikh Mohamed Bashir be made defendants to this suit and further that Satish Gautama, the present defendant, be relieved of defending this action subject to his paying into court Shs. 100,000/-, the subject-matter of this action.
2. That the applicant defendant's costs in these proceedings to be paid now and in any event by Farouq Investments Limited and Sheikh Mohamed Bashir, such costs to be taxed and certified by the Taxing Master of this Honourable Court on Queen's Counsel basis.”

We were informed that the money has been paid into court as per the said order.

What an interpleader is and when it applies is clearly set out in s. 58 of the Civil Procedure Act, which reads:

- “58. Where two or more persons claim adversely to one another the same debt, sum of money, or other property, movable or immovable, from another person, who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants or where a suit dealing with the same subject-matter is pending may intervene by motion on notice in such suit for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made, and of obtaining indemnity for himself:

Provided that where any suit is pending in which the rights of all parties can be properly decided no such suit of interpleader shall be instituted.”

This section is to some extent amplified by O. 33 of the Civil Procedure (Revised) Rules 1948, r. 2 of which only needs to be quoted:

- “2. In every suit of or application by way of interpleader the applicant shall satisfy the court by way of affidavit or otherwise;

- (a) that the applicant claims no interest in the subject-matter in dispute other than for charges or costs;
- (b) that there is no collusion between the applicant and any of the claimants;
- (c) that the applicant is willing to pay or transfer the subject-matter into court or to dispose of it as the court may direct."

Thus, as I understand the law, before an interpleader will issue the applicant must establish:

- (1) that he holds a sum of money in which he claims no interest except for charges and costs;
- (2) that two or more persons claim adversely to one another that sum of money;
- (3) that there is no collusion between the applicant and any of the claimants; and
- (4) that the applicant is willing to pay the money into court or to dispose of it as the court may direct.

Conditions (1) and (4) are clearly satisfied in the present case. As regards condition (3), there is the affidavit of the applicant himself which stands uncontradicted and which the learned judge obviously accepted. As regards condition (2) it seems to me, on the face of the record, that there are here three rival claimants to this sum of money; namely, Sargent, Farouq and the estate of Rashid. That being so, it seems to me *prima facie* that this was a proper case for interpleader proceedings to issue. Much has been made of the fact that as all three claimants claim against the applicant they cannot litigate against each other. But as I have just pointed out, this is exactly where interpleader proceedings are necessary. If they had any claims against each other they would have to litigate their claims in the ordinary way and no question of interpleader would arise. I should also perhaps point out here that in deciding whether there are rival claims the court does not go into the merits of these claims except to satisfy itself that they are not frivolous.

Bashir, the executor of the estate of Rashid who claims the money, supports the order for interpleader except in regard to the costs, though he filed no appeal against the order. Both Sargent and Farouq have appealed. It is contended by Mr. Salter, for Sargent, and I hope I have understood his arguments correctly, first, that the application was incompetent because there were no adverse claims. He submitted that the applicant originally received the money as advocate and agent of Sargent, that on receipt of the money it became the property of Sargent, and that consequently the applicant has no defence in law to a claim for the money by Sargent and moreover that no-one else can have a valid claim to that money. Second, that the order for interpleader was wrong as it rests on the erroneous finding of the court below that the applicant was a stakeholder. Mr. Khanna, for Farouq, also contends that the order is incompetent for a number of reasons, one of which is identical with Mr. Salter's second contention. The others are that Farouq's claim against the applicant is not for the same sum of money but for an equivalent sum of money and that it is not adverse to that of Sargent. He submits that adverse means that one party must affirm a proposition and the other deny it and that for a claim to be adverse the claimants must be alleging the same obligation by the applicant. Mr. Khanna also contends that if Rashid's estate has any claim, which he disputes, it is against Farouq and not the applicant and that in any event one of two executors of an estate cannot be joined as a defendant to represent the estate in a suit (O. 13, r. 2). He also contends that the applicant should not have been removed as a defendant as he is the basis of the claim and also that

the order for costs was wrong, especially as, in his submission, the present situation has been created by the applicant's dilatoriness and remissness and he ought to bear all the costs. There was also, in his submission, no justification for discriminating against Rashid and Farouq in favour of Sargent and the applicant in the matter of costs. Both Mr. Salter and Mr. Khanna also argued that it was pointless to make the estate of Rashid and Farouq defendants as Sargent had no claim against them and vice versa, and also that it would likewise be well nigh impossible to frame the proper issues to be tried between the three claimants especially if the applicant were excluded from the trial on those issues.

I agree with Mr. Salter that if the applicant received the money on behalf of Sargent as his advocate or agent, the money belonged to Sargent the moment it was received and the applicant has no valid answer to a claim by Sargent for the money. But this very point is in issue and if, as seems to have happened in this case, Sargent purported to repudiate the agreement under which the money was paid and later instructed the applicant to return it to the payer and then after a number of years has elapsed changed his mind and claimed the money from the applicant, it is, to say the least, arguable whether he is still entitled to it, especially when the payer and the drawer of the cheque also lay claim to it. There is, in these circumstances, a serious and difficult matter for litigation and this is amply borne out by the lengthy arguments that have been addressed to us both by Mr. Salter and Mr. Khanna on the respective merits of their client's claims. It is clear law, and I have already alluded to it before, that in an application for interpleader, once it is established that there are rival claims to the same subject-matter, interpleader will, as a general rule, issue, unless the court is satisfied that one of the claims is obviously good and the other, or others, obviously bad. The learned judge found that there were rival claims and it must be assumed that he was satisfied that they were neither obviously good nor obviously bad. For myself, I would not be prepared to decide one way or the other without hearing full arguments and possibly evidence as well. I have not forgotten Mr. Khanna's contention that Farouq is not claiming the same money but an identical amount. I find no substance in this argument and to me all these claimants are claiming the same Shs. 100,000/- which was paid to the applicant.

Regarding the contention that the finding by the learned judge that the applicant was a stake-holder vitiated his order, assuming such finding to be erroneous, it was in my view unnecessary for a decision of the matter before the court below and having regard to the other findings of that court, namely that the applicant claimed no interest in the money and that there were adverse claims to it, it cannot affect the validity of the order. I am also unable to agree with Mr. Khanna's interpretation of the word "adverse". In my view, so long as two persons claim to be entitled to the same sum of money in the hands of a third person in opposition to each other, there arise adverse claims and I am satisfied that such is the position here.

For these reasons I would uphold the learned judge's order to the extent that interpleader proceedings should issue, although I consider that this is the sort of case in which the court should have framed the issues to be decided between the claimants. I am not very happy, however, with the order dismissing the applicant from the suit altogether nor with the order for costs. As regards the former, there is also a claim for interest on the sum of money in his hands and this matter cannot properly be decided without his being a party to the proceedings. This claim is, however, incidental to the entitlement to the money and may be reserved for subsequent decision.

As regards the order for costs, *prima facie* there can be no good reason for favouring Sargent at the expense of the two other claimants and the learned

judge has given no reason for doing so. Moreover, it seems to me that it is impossible to make a fair order for costs without first deciding the entitlement to the money as the decision on this question must inevitably affect that order. In the result, Sargent's appeal largely fails while that of Farouq succeeds in part and fails in part. In these circumstances and for the reasons I have given I agree with the order proposed by Duffus, J.A. and as Spry, J.A. also agrees it is ordered accordingly.

Spry JA: I have had the advantage of reading in draft the judgments of De Lestang, V.-P., and Duffus, J.A., with which I am in full agreement. I have no doubt that the various claims are all to a particular, identifiable sum of money, not, as Mr. Khanna argued, to equivalent amounts. The claims are mutually exclusive and therefore, in my view, adverse to each other. Mr. Gautama has sworn an affidavit that he has no claim to the money, other than for charges or costs, and he has paid the money into court. Therefore, *prima facie*, s. 58 of the Civil Procedure Act applies.

I would certainly not be prepared to say, at this stage, that any of the claims is wholly without merit. It seems to me, with respect, that Mr. Salter's very persuasive argument is based on an assumption of fact, that the money in dispute was paid to Mr. Gautama unconditionally on behalf of his then client. But that is one of the facts in issue. A similar criticism may be made of much of Mr. Khanna's argument. Essentially, I think, the matter turns on three questions of fact: who provided the money, on what footing was it paid to Mr. Gautama on July 27, 1961, and did anything happen after that date which affected the capacity in which Mr. Gautama held the money. There may, of course, be issues of law arising out of the answers to these questions. These are matters that need to go to trial. In my view, this is the very kind of case for which the interpleader procedure was created.

I am not prepared to express any opinion at this stage whether the learned judge's finding that Mr. Gautama was a stakeholder was right or wrong, because I think, with respect, that that is a question to be decided at the trial.

I agree that Mr. Gautama should not be entirely discharged from the proceedings and that the order for costs should be varied, and I agree with the proposed order.

For the appellant:

C Salter, QC and A Robson

Robson, Harris & Co, Nairobi

For the respondent:

JA Mackie-Robertson, QC and AB Shah

Kantilal A Shah & Co, Nairobi

For Farouq Investments Limited:

DN Khanna

Khanna & Co, Nairobi

Bashir appeared in person.

Kaluma v and others Republic

[1968] 1 EA 349 (CAN)

Division: Court of Appeal at Nairobi
Date of judgment: 11 May 1968
Case Number: 12/1968 (76/68)
Before: Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by: LawAfrica
Appeal from: High Court of Kenya – Ainley, CJ

[1] Evidence – Admissibility – Confession – Statement to police – Statement made to police in Uganda – Whether admissible in Kenya court – Statement not voluntary – Whether subsequent statement made in Kenya adopting involuntary statement makes both statements admissible – Evidence Act, s. 28 (K.).

[2] Evidence – Admissibility – Statement by deceased – Statement as to circumstances of transaction which resulted in death – Whether admissible – Evidence Act, s. 33 (K.).

Editor's Summary

The three appellants were convicted of the murder of two women in Kenya. The appellants were wanted by the Uganda police, and the two women were part of a party sent to Kenya to find and arrest them. Evidence was admitted at the trial of the facts that one of the women had been making enquiries about the appellants and that this had been reported to the appellants, on the ground that it was relevant evidence of a motive or reason for the murder. After the murder the appellants fled to Uganda, where they were arrested and where they made statements to the Uganda police. These statements were found, in the case of two of the appellants, to have probably been involuntary as having been made after those two appellants had been beaten. The appellants were then brought to Kenya, where they made statements to the Kenya police which were shown to have been made voluntarily and which adopted their Uganda statements. The court below admitted all the statements. On appeal, it was argued that the evidence about the enquiries should not have been admitted as being hearsay; and that none of the statements should have been admitted.

Held –

- (i) s. 28 of the Evidence Act of Kenya is of general application and excludes proof of confessions allegedly made by persons in police custody, wherever that may have been, unless made in the immediate presence of a magistrate or police officer of or above the rank or equivalent rank of sub-inspector. It does not apply only to Kenya police officers;
- (ii) even if the statements made to the Uganda police were inadmissible, such statements could become admissible if subsequently adopted in a statement which was proved to have been made voluntarily; and had been adopted or acknowledged in voluntary statements made in Kenya, and therefore all the statements were admissible;
- (iii) the evidence about the enquiries was admissible under s. 33 of the Evidence Act of Kenya as a statement made by a person who is dead as to the circumstances of the transaction which resulted in death, and was not excluded as hearsay (*Barugahare v. R.* (2) followed).

Appeals dismissed.

Cases referred to in judgment:

(1) *Swami v. King-Emperor*, [1939] 1 All E.R. 396.

(2) *Barugahare v. R.*, [1957] E.A. 149.

Judgment

May 11, 1968. The following reasons for the judgment of the court were read by **Law JA**: The three appellants, to whom we shall refer respectively as Kiwanuka, Kyeyune and Oboo, were convicted in the High Court of Kenya (Ainley, C.J.) of the murder of two young women, Lillian Millie and Sara Massa, after a trial lasting nearly two months. On May 3, 1968, we dismissed the appeals of all three appellants, and we now give our reasons.

The bodies of the two women were found in the Athi River, about seventeen miles from Nairobi, on April 8, 1967. Lillian had been manually suffocated, and Sara had been strangled by means of a rope fastened tightly round her neck; their bodies had been placed in gunny bags weighted with rocks and thrown in the river some days before they were discovered.

The appellants were three of a number of men against whom warrants of arrest had been issued in Uganda in connection with crimes alleged to have been committed in Uganda. These men were known to be living in Nairobi. The warrants were duly endorsed by a magistrate in Uganda for execution in Kenya, and were brought to Nairobi by Superintendent of Police Wauyo on March 31, 1967. Mr. Wauyo was accompanied by Sara, a policewoman in the Uganda Police, and Lillian, a civilian who knew the wanted men and whose task was to identify them. The young women stayed at the Princess Hotel, and started to make enquiries as to the whereabouts of the wanted men from other members of the Baganda community living in Nairobi, many of them refugees from Uganda who had fled the country after the troubles in 1966. There was evidence from a man called Bulwadda that on April 2 Lillian told him, in Sara's presence, that she wanted to see one Senkoma, because Kyeyune and Oboo were living with him. At Bulwadda's request, Lillian wrote her name and telephone number in his diary. Bulwadda then went to the house of one Mwanda in Eastleigh, Nairobi, and told him in the presence of the appellants Kiwanuka and Kyeyune that Lillian wanted to see him. At about 7.15 p.m. on April 3, Lillian received a telephone call at the Princess Hotel, after which she told Mr. Wauyo "I have spoken with Senkoma, he has invited me and Sara to go to a cinema and dance. He wants to meet us in front of the Kenya Cinema at 8.30 p.m. this evening". At about 8.30 p.m. Lillian and Sara left the hotel, carrying their handbags. They have not since been seen alive. A witness called Lukyamuzi, who was believed on this point, deposed that between 6.30 and 7 p.m. on April 3 he saw the three appellants, together with Mwanda and Senkoma, in a Ford Zephyr car. Mwanda in fact owned such a car. There was also evidence from a girl called Essey to the effect that the five men came to her room at about 10 p.m. on the same night and that Oboo gave her a handbag which was subsequently recovered by the police and identified to the learned Chief Justice's satisfaction as being the property of Lillian.

The three appellants left Nairobi soon afterwards and returned to Uganda. Kiwanuka was arrested by Constable Ecwinyu and Corporal Ajal some ten miles outside Kampala on May 16, after a chase and a struggle, in the course of which Kiwanuka fell and injured the back of his head on a coffee tree-stump. He was taken to Kampala police station where on May 18 he is alleged to have made an extra-judicial statement under caution to Assistant Inspector Nsubuga, in which he admitted being in Mwanda's car when the girls were killed, but denied taking any part in the killings. Kiwanuka was subsequently extradited to Kenya where, on May 24, he was formally charged with the murder of the two young women, and cautioned, by Assistant Superintendent Sokhi. Kiwanuka replied that he had already made a statement in Uganda in which he had said all he wanted to say. He was shown the statement recorded by Inspector Nsubuga and identified it as the statement he had made. Just before making this statement to

Mr. Sokhi, Kiwanuka had gone with Mr. Sokhi in a car and pointed out various spots mentioned in his Uganda statement. This fact was referred to in

the statement made to Mr. Sokhi. Kyeyune and Oboo were arrested together on May 25, at Kyakatiri some sixty-eight miles from Kampala, again after a struggle, and taken to Kampala. There Kyeyune is alleged to have made an extra-judicial statement to Superintendent Ssalongo on May 26, which is a full confession of participation in the murders of Lillian and Sara; and Oboo likewise is alleged to have made a full and detailed confession of his guilt in an extra-judicial statement to Assistant Commissioner Hassan on May 27. These two appellants were also extradited to Kenya, after appearing before a magistrate in Kampala. On May 31 Kyeyune was formally charged in Nairobi with the murder of the two young women by Chief Inspector Dogra, and he made another long and detailed statement amounting to a full confession. After making this statement he went in a car with Mr. Dogra and pointed out places mentioned in the statement. Oboo made a similar detailed confession to Assistant Inspector Owuor-Ongeche on the same date, and thereafter similarly pointed out to Mr. Owuor-Ongeche various places mentioned in his statement.

Subsequently on June 2 Kyeyune made a further short statement to Mr. Dogra which confirmed the intimate part he played in the murders and on June 3 Oboo sent for and made a further short statement to Mr. Sokhi to the effect that the murders were politically inspired. Now, all three appellants denied at the trial ever having made any statements to any police officers, whether in Uganda or in Kenya. They said that they were subjected to systematic torture in Kampala Police Station, as a result of which they signed and initialled various papers in places indicated to them. In particular Kiwanuka claimed that the injury to his head was not caused accidentally on arrest, but later the same day at Kampala Police Station where, he says, he was beaten on the head and shoulders with rifle-butts, and all over the body with batons and fists. He was shackled "spread-eagled" on the floor of a cell, made to drink a mixture of blood and urine, kicked, electric shocks were administered to him, and he was generally so ill-treated that his clothes were full of blood. This man was treated for his head injury by Dr. Odidi in Kampala on May 16, when he told the doctor that the injury was sustained during arrest. He made no complaints of any other injury and showed no signs of ill-treatment. Kiwanuka was also examined by Dr. B. P. Patel in Nairobi on May 30, when he appeared to be in normal health and made no complaints of any injury or ill-treatment. Kyeyune and Oboo also described in great detail the systematic beatings, ill-treatment and electric shocks to which they say they were subjected in Kampala. Oboo deposed that he was beaten "almost to death" and kicked in the private parts. These men were both seen by Dr. Patel in Nairobi on June 5, and carefully examined when stripped to the waist. They were asked if they had any complaints. Neither complained of any injury or ill-treatment, nor were any signs of injury noticed by the doctor. Oboo, however, complained to Dr. Ongeru on June 27 that he had been beaten by the Uganda Police on May 26, and the doctor saw eleven healed superficial abrasions on his back, which could have been caused by a stick or cane. In the same way Kyeyune, on June 21, complained to Dr. Patel that he had been beaten, and Dr. Patel noticed four or five bruises on his back, which he thought might have been four to six weeks old, and which were consistent with blows from a stick or cane. The Chief Justice naturally gave all these matters very careful consideration. His conclusion was that the allegations of ill-treatment were grossly exaggerated and largely invented, but he was satisfied on the evidence that Kyeyune and Oboo had received a caning between the time of their arrest and their arrival in Kenya. This is a very serious matter, and one which has caused this court much concern. In his judgment the Chief Justice came to the conclusion that the confessions by Kyeyune and Oboo were not induced by the beating they undoubtedly received in Uganda; at the same time he remarked, in the course of his ruling in the "trial within a trial", that

“if this story had stopped short in Uganda there might have been a proper case for rejecting the admissions made in Uganda”. This leads to a consideration of the first and second grounds of appeal, which were that the Chief Justice erred in holding that the statements alleged to have been made by the appellants to police officers in Uganda and Kenya and admitted in evidence were voluntarily made by the appellants and were admissible in evidence. Mr. H. C. Kapila for the appellants made three submissions in support of this ground. First, he submitted that the statements of all three appellants were concocted by the police. We have no hesitation in rejecting this submission as quite unfounded. Secondly, Mr. Kapila submitted that the statements allegedly made in Kampala were inadmissible under s. 28 of the Evidence Act, which reads:

“No confession made by any person whilst he is in the custody of a police officer shall be proved as against such person, unless it be made in the immediate presence of,

- (a) a magistrate, or
- (b) a police officer of or above the rank of, or equivalent to, sub-inspector.”

Mr. Kapila’s argument was that the first part of the section is of general application, so as to exclude any confession made by a person in police custody anywhere in the world, and that the exceptions only apply to confessions made in the immediate presence of a Kenya magistrate or of a Kenya police officer of or above the rank of, or equivalent to, sub-inspector. We do not agree. We consider that s. 28 should be interpreted as being of general application throughout; it excludes proof of confessions allegedly made by persons in police custody, wherever that may have been, unless made in the immediate presence of a magistrate or police officer of or above the rank or equivalent rank of sub-inspector. In this respect we do not agree with the view of the Chief Justice who considered that the section applied only to Kenya police officers. The police officers who recorded the confessions were proved to be of such equivalent rank, and the confessions were accordingly receivable in evidence, subject of course to proof by the prosecution that they were made voluntarily. This leads to the third and most important submission made by Mr. Kapila under these grounds of appeal that the statements resulted from violence, threats and inducements on the part of police officers in Uganda, so as to render inadmissible any statement made in Uganda, and that the effects of such violence, threats and inducements still operated on the minds of the appellants when they subsequently made statements in Kenya, so as to render the latter likewise inadmissible, and that the Chief Justice should have held that the prosecution had failed to discharge the burden of proving that any one of the statements, whether made in Uganda or in Kenya, was voluntary. So far as Kiwanuka is concerned, the only injury suffered by him was sustained accidentally on arrest. He was given immediate medical attention for this injury. At the end of his long and detailed unsworn statement in his defence at the trial, he gave an unsolicited testimonial to the Kenya police in the following words:

“Force has frequently been used in Africa in the past. I am grateful to the police in Kenya for not beating me.”

We agree with the Chief Justice that the statements made by the appellant Kiwanuka were voluntary and admissible. So far as the appellants Kyeyune and Oboo are concerned, they received a caning at some time in Uganda, probably soon after arrest. We agree with the Chief Justice that this would probably have resulted in their Uganda statements being rejected as involuntary in a trial in Uganda. But these two appellants were removed to Kenya. Neither has made the slightest allegation of having been beaten or offered inducements

by the Kenya police. Both were properly charged and cautioned, and made statements either adopting or repeating their Uganda confessions. Oboo even went as far as sending for a Kenya police officer, to whom he made a further statement as to whose voluntary nature there can be no doubt. Even if each Uganda statement, standing by itself, were inadmissible, we consider that such a statement can become admissible if subsequently adopted in a statement which has been proved to have been made voluntarily. We are satisfied that the statement of each of the three appellants, made in Uganda, was adopted or acknowledged by each of them respectively in subsequent voluntary statements made in Kenya, and we accordingly see no reason to differ from the learned Chief Justice when he held that all the statements tendered by the prosecution were proved to have been made voluntarily and were therefore admissible in evidence. We accordingly consider that the first two grounds of appeal fail. This is sufficient to dispose of this appeal, as the statements made by each of the three appellants involve admission by each of them of a sufficient degree of complicity in the murders of Lillian and Sara to justify their convictions.

However, one other ground of appeal was argued by Mr. Kapila which is of sufficient public importance to require attention in this judgment. We refer to ground 3, which reads:

“The learned Chief Justice erred in admitting the evidence of statements, oral and written, alleged to have been made by the deceased, Lillian Millie to prosecution witnesses numbers 31, 32, 33 and 43 Bulwadda, Nzubugua, Masumba and Wauyo respectively.”

Mr. Kapila objected to the witnesses Bulwadda, Nzubugua and Masumba being allowed to testify about what Lillian had said to them about her inquiries as to the whereabouts of one or more of the accused, and the fact that these inquiries were reported to some of the accused, on the grounds that such evidence was hearsay. He also objected on the same grounds to Inspector Wauyo being allowed to testify that Lillian had told him she was going to meet one of the accused on the night she was murdered. The Chief Justice admitted evidence of the fact that Lillian was making inquiries about the accused, and the fact that this was reported to the accused, or some of them. He held that this evidence was clearly admissible as providing some evidence of a motive or reason for killing Lillian. We agree. We do not consider that any question of a breach of the rule against hearsay arises. If a witness says “I told the accused that Lillian was looking for him” he is giving direct evidence of a fact, which, if relevant, is admissible. In this case it was relevant as tending to show a motive or reason why the accused persons should have hostile feelings towards Lillian. The evidence was not tendered for the purpose of proving the truth of what Lillian had said, in which case it would have been inadmissible. As regards what Lillian told Mr. Wauyo on the evening of her death as to the identity of the persons she was proposing to meet, we agree with the Chief Justice that Mr. Wauyo’s evidence to that effect was admissible under s. 33 of the Evidence Act, which renders admissible statements made by a person who is dead when the statement is made as to any of the circumstances of the transaction which resulted in death. Precisely the same situation as in this case was considered by the Privy Council in *Swami v. King-Emperor*, [1939] 1 All E.R. 396, a case which was approved and applied by this court in *Barugahare v. R.*, [1957] E.A. 149, and in which it was held that statements made by a deceased person that he was proceeding to the spot where he was in fact killed, or as to his reasons for so proceeding, or that he was going to meet a particular person, or that he had been invited by such person to meet him, would each of them be circumstances of the transaction, and would be so whether the person was unknown,

or was not the person accused. In this case Lillian, shortly before her death, told Mr. Wauyo that she had been invited to meet one of the accused, and that she was going to meet him, and evidence of this statement was in our opinion rightly admitted as relating to the circumstances which led to her death.

For these reasons we dismissed the appeals of all three appellants.

Appeals dismissed

For the appellants:

HC Kapila

DV Kapila & Co, Nairobi

For the respondent:

OP Nagpal (Senior State Counsel, Kenya)

Attorney-General, Kenya

General Manager E A R & H A v Thierstein
[1968] 1 EA 354 (HCK)

Division:	High Court of Kenya at Nakuru
Date of judgment:	18 October 1967
Case Number:	26/1967 (78/68)
Before:	Harris J
Sourced by:	LawAfrica

[1] *Civil Practice and Procedure – Amendment of pleading – Procedure for – Application should be by chamber summons – Civil Procedure (Revised) Rules 1948, O. 6, rr. 17, 18, 21 and 30 (K.).*

[2] *Civil Practice and Procedure – Amendment of pleading – Application to amend made after applicant’s case closed as a result of submission by opponent – Whether amendment should be made – Principles upon which court should act under O. 6, r. 18 of Civil Procedure (Revised) Rules 1948 (K.).*

[3] *Negligence – Collision – Car swinging across road as if to turn into side road – Driver of car coming in opposite direction misled into going onto his wrong side – Second driver travelling at speed – Both equally to blame.*

[4] *Negligence – Contributory negligence – Speed – Driving at seventy m.p.h. on Nakuru-Nairobi road negligent in circumstances of case.*

Editor’s Summary

A car belonging to the plaintiff and driven by his servant, K, was in collision with a car owned and

driven in the opposite direction by the defendant on the main Nairobi to Nakuru road at a place where two minor roads entered the main road. The collision occurred on the defendant's wrong side of the road. The defendant in evidence maintained that the car driven by K had come across onto his, the defendant's, side of the road while travelling slowly at a point near the minor road, which caused him, the defendant, to think that it was going to turn off (even though no signal had been made) and to go onto his wrong side in order to pass behind it as it turned off the main road; but that at the last minute it swerved back onto its correct side giving him no chance to avoid it. The defendant admitted that he was travelling at seventy m.p.h. K in evidence said that he was going at thirty m.p.h. because of a bend in the road, and admitted that he was not keeping a proper look-out. The plaintiff sued the defendant for the damage to his motor car; and the defendant filed a counterclaim which erroneously suggested that the plaintiff's car was being driven by the plaintiff himself and not by K, and erroneously attributed to the plaintiff instead of to the defendant himself the essential averment of negligence upon which the counter-claim depended. At the end of the hearing, after the defendant had closed his case, counsel for the plaintiff raised these errors and when the defendant applied to amend, opposed the application on the grounds that:

- (i) it should have been made by chamber summons,

- (ii) it was too late,
- (iii) to allow an amendment would deprive the plaintiff of an accrued right,
- (iv) the amendment would introduce a possible question of vicarious liability for K's negligence about which no evidence had been led,
- (v) the plaintiff could not be adequately compensated in costs.

Held –

- (a) On the issue of negligence:
 - (i) the primary cause of the accident was the negligence of K and the defendant was not negligent in concluding that K intended to turn off the main road and acted properly and promptly in attempting to avoid the collision, notwithstanding that in doing so he crossed over to his incorrect side of the road; but
 - (ii) the defendant was driving too fast in the circumstances; therefore
 - (iii) the two drivers were equally to blame for the collision.
- (b) On the application to amend:
 - (i) the defendant's application to amend should have been made by chamber summons and must be disallowed; but
 - (ii) it is incumbent upon the court under O. 6, r. 18 to ensure that the pleadings are in a suitable form to enable the "real questions in controversy" between the parties to be determined; so that the court should still consider the matter;
 - (iii) there was no culpable failure or dilatoriness on the part of the defendant and it was not too late to make an amendment;
 - (iv) there was no "accrued right" in the plaintiff which would prevent an amendment being made;
 - (v) the possibility of new evidence being made necessary, even if it existed, afforded no reason for not making an amendment;
 - (vi) even if the plaintiff could not be adequately compensated by an order for costs in his favour this was no reason for not making an amendment.

Amendment ordered.

No cases referred to in judgment

Judgment

Simpson J: read the following order made by **Harris J:** On the morning of September 28, 1966, a collision occurred at a place named Mbaruk on the main Nakuru to Nairobi road about twelve miles from Nakuru between a Ford Zephyr Mark II saloon car, registered number KGZ 766, owned by the plaintiff and used as a railway staff car, and a Peugeot 404 saloon car, registered number KKG 863, owned by the defendant. The plaintiff's vehicle was driven by a driver employed by him named Kitenge, the defendant was driving his own vehicle, and each car was so extensively damaged as to render it uneconomical to

repair it. The plaintiff claims general damages for the loss of his vehicle, measured at its value of Shs. 5,900/-, and the defendant counter-claims for a sum of Shs. 12,263/- as representing the pre-accident value of his vehicle less its sale value as scrap.

The collision occurred on the northern or left-hand side of the road as one approaches Nakuru from the direction of Nairobi and at a place somewhere between the points at which two minor roads on the southern or right-hand side entered the main road. These minor roads constituted in fact two exits on to the main road from a single road leading to the Ngorika Settlement Scheme near Dundori. On the left-hand side of the main road as one approaches

Nakuru a side road enters from Soysambu at a point nearly opposite to the more westerly of the two exits from the Dundori road, and a little back towards Nairobi there is a slight left-hand bend in the road as it reaches the top of an incline.

The plaintiff's driver, Kitege, in his evidence said that just before or possibly immediately after he had finished negotiating the left-hand bend he saw the defendant's car approaching at a very fast speed on its correct side and that suddenly, when about five yards away, it swerved right across the road, and struck the plaintiff's car. He said that he (Kitege) was travelling at only thirty miles per hour because of the bend in the road and he admitted that he was not keeping a proper look-out, did not observe the Peugeot until it was about seventeen yards away, and did not apply his brakes as he had not had time to do so. He further stated that the defendant's car stopped immediately after the impact while the vehicle which he was driving turned itself around until it faced back towards Nairobi and veered off to the grass verge on the Dundori side of the road.

Measurements taken by a police corporal on the day of the accident showed that the defendant's car had made skid marks on the road commencing at a point about four feet from the verge on his near side and continuing for sixty-five feet up to what appeared to be the point of impact which was itself less than five feet from the verge on the defendant's off-side.

The defendant, who is an engineer in agricultural engineering attached to the Egerton Agricultural College at Njoro, said in evidence that when he first saw the plaintiff's car he was travelling at about seventy miles an hour and the vehicles were something more than fifty yards apart, each being on its correct side. According to him the plaintiff's car then crossed over to its incorrect side, that is, into the lane occupied by his own vehicle. The defendant at that point was approaching one of the roads leading to Dundori and, as the plaintiff's car appeared to be travelling at about twenty to thirty miles an hour, he concluded that, although no express signal was given, it was about to cross over and turn into one of the entrances to the Dundori road. The defendant applied his brakes, a step which he said he would have taken in any event in view of his speed as he approached the bend, and drew slightly out towards his right-hand side in order to pass behind the other car upon its turning (as he anticipated) into the side-road. As soon as he had observed that it was not turning into the side-road the defendant veered further to his right to avoid a collision but unfortunately the plaintiff's car turned at that point back towards its own left-hand side of the road leaving the defendant, in his view, no opportunity to avoid the collision as the time and distance were then too short.

As in all cases of this nature the measurements of time and distance mentioned by the witnesses were mere approximations, depending upon their accuracy of observation and of memory. I should say, however, that I was impressed by the evident anxiety of each of the drivers to present a fair and accurate picture.

The plaintiff produced no map or plan of the locus in quo but invited the court to visit the scene and, as it were, to see for itself. Apart from the inconvenience to the court, this is not always a desirable practice for, in the first place, the geographical features of the locus may well have altered between the time of the accident and that of the court's visit (as, indeed, would appear to have occurred in the present case), and, secondly, an inspection by the court may well give rise in its mind to questions capable of being satisfactorily answered only from the witness box. The defendant tendered in evidence (the plaintiff not objecting), a very rough sketch plan prepared by the police corporal, together with a copy of that plan prepared by another policeman, each of which had been used in the magistrate's court at the hearing of a prosecution of the

defendant arising out of the accident in which he was charged with dangerous driving and it was held that the prosecution had failed to establish a case for him to answer. These plans, although of some assistance, did not provide an adequate picture and accordingly, after the hearing had terminated, I visited the scene, and my findings in this order are based in part upon a personal inspection then made by me.

I am satisfied that the cars must have been more than fifty yards apart when each came within the range of vision of the other, that at that moment the plaintiff's car was negotiating the slight bend on rising ground while the defendant was approaching the end of a "straight" and the commencement of the bend and of a down slope. The bend, as I have said, is not sharp and I cannot accept the implication in the evidence of the plaintiff's driver that the reason why he was travelling at a speed of only thirty miles an hour was because of the bend. He could with complete safety have driven at a considerably faster speed insofar as concerns the contour of the roadway.

After careful consideration of the matter I am satisfied that the primary cause of the accident was the failure of the plaintiff's driver to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle upon the public highway. He admitted in evidence that he did not see the defendant's car until it was only about seventeen yards away, that he was not keeping a proper look-out, that after first seeing the car he did not see it again until the collision had occurred, and that he had not put on his brakes as he was not aware until too late that that would be necessary. I am also satisfied that the plaintiff's car, just before the accident, came out from its left hand side towards, and possibly as far as, the centre of the road, and that by reason of this movement and also of its slow speed, the defendant was misled into thinking that it would turn into one of the side roads leading to Dundori. Despite the absence of any signal to support it, I do not consider that, in coming to this conclusion, the defendant was negligent, and it is apparent that, once the possibility of a collision arose, he acted properly and promptly in attempting to avoid or minimize it, notwithstanding that in so doing he crossed over to the incorrect side of the road and there struck the other vehicle.

On the other hand regard must be had to the speed at which the defendant was travelling when he first observed the plaintiff's car. Although there are many parts of the main Nairobi-Nakuru highway where under favourable conditions a speed of seventy miles an hour is not excessive, at this particular place a lesser speed is called for in the case of a vehicle driving towards Nairobi by reason of the side roads, the bend and the slight hill, and I hold that, in travelling as he did, the defendant was clearly guilty of contributory negligence. Although it would not be accurate to say that the defendant's car was out of control, it is self-evident that, in relation to his speed, the defendant did not have sufficient braking power to avoid hitting the plaintiff's vehicle. I would apportion the blame for the collision and the resultant damage equally between the two drivers.

It is necessary at this juncture to refer to the form of the defendant's counterclaim. As framed this pleading erroneously treats the case as if the plaintiff's vehicle had been driven at the material time by the plaintiff himself, instead of by the driver, Kitege, in addition to which, by what is clearly a typographical error, it attributes to the plaintiff instead of to the defendant the authorship of the averment of negligence on the part of the plaintiff upon which the entire counter-claim depends. Fortunately, however, counsel for the plaintiff was in no way misled by these errors, having, as he says, observed them a long time previously and having even attempted unsuccessfully to point them out to counsel for the defendant (who was unaware of them) immediately before the

hearing began. He did not bring them to the court's attention, however, until the opening of his final address, by which time counsel for the defendant had closed his case and addressed the court, and when the latter, immediately he was made aware of the matter, sought leave from the court to file an amended pleading, counsel for the plaintiff strongly opposed the application. A more convenient course to follow might have been for the plaintiff to have applied before the hearing to have the counter-claim struck out as disclosing no cause of action, which would have enabled the defendant, in effect, to bring forward his present application before the commencement of the hearing and it is, perhaps, regrettable that this course was not adopted. The course which in fact was followed, of allowing counsel for the defendant to conduct his entire case while both he and the court were under the impression that the counterclaim was effectively framed to raise the issue which the plaintiff well knew it was intended to raise, and then resisting an application to have the error corrected, is inconvenient and has resulted in a waste of the court's time.

The well-established practice in this country governing the amendment of pleadings is concisely stated in O. 6, r. 18 of the Civil Procedure (Revised) Rules 1948, which, in the first place, enables the court, at any stage of the proceedings, to allow either party to alter or amend his pleadings in such manner and on such terms as may be just and, in the second place, goes on to require in clear and mandatory language that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties". The plaintiff, however, offers a number of reasons as to why this practice should not be followed in the present case and with these I will now deal seriatim.

His first contention is that the application for leave to amend, being brought under the provision referred to, should have been instituted by chamber summons. There is no doubt that r. 30 of O. 6 provides that applications under rr. 17, 18 and 21 of the Order shall be by summons in chambers and that the plaintiff's objection is well-founded. The matter, however, does not end there for there is nothing in the rules which purports to deprive the court of its essential and inherent jurisdiction to allow or direct of its own motion at the hearing of the action, and upon terms if necessary, all such amendments to the pleadings as may be or become requisite to secure the ends of justice, and the second part of O. 6, r. 18 makes it incumbent on the court without necessarily awaiting an application in that behalf by either party, to ensure that the pleadings are in a suitable form to enable the "real questions in controversy" between the parties to be determined. Yielding, therefore, to the plaintiff's objection, which is technically correct, I shall disallow the defendant's application as such and proceed to consider the matter from the stand-point of the duty of the court in the circumstances which have arisen, treating the remaining objections put forward by the plaintiff to the defendant's application as if they were contentions in support of his opposition to the making in any manner of an order for the amendment of the counter-claim.

The plaintiff's second contention then, is that the case has now reached too advanced a stage to permit of such amendment in view of the fact that the defendant knew all along that the plaintiff's vehicle was not being driven by the plaintiff in person. There is no substance in this argument for the position which has arisen does not arise from a culpable failure of the defendant to base his pleadings upon the known facts but is the result solely of a comparatively simple drafting error made by counsel in settling his pleadings for which the defendant personally is in no way responsible. Furthermore, there can be no suggestion that the defendant was dilatory in dealing with the matter after it had been brought to his counsel's attention.

The plaintiff's third contention is that if amendments were now to be directed the effect would be to deprive him of a "right" which has accrued by reason of the defendant's "failure to prove his counter-claim", by which, no doubt, is meant a failure to prove the averments which would be contained in the counterclaim if the amendments were to be made. The case, however, is still at hearing, judgment has not been pronounced, and no such "right" as the plaintiff claims has come into existence.

The plaintiff's fourth contention is that if amendments were to be made on the lines suggested they would give the defendant a right to substitute a relationship between the parties different from that now shown in the pleadings, and would introduce for the first time the question of a possible vicarious liability on the part of the plaintiff for the mismanagement by his driver of the former's car. This, the plaintiff says, might necessitate the introduction by the defendant of fresh evidence to prove that the driver, in driving the plaintiff's car as he did, was acting within the scope of his authority as the plaintiff's servant. Without expressing any view as to the correctness of this suggestion I do not consider that, in the particular circumstances of this case, it can afford a reason for not giving effect to the manifest intention of O. 6, r. 18 that the pleadings should be made effectively to raise for determination what clearly appear to be the real questions in controversy.

The plaintiff's final ground of objection is that, if any amendments were to be made, the plaintiff could not be adequately compensated by an order for costs in his favour. This may well be true, but, when the circumstances of a case require an amendment of the pleadings, the fact that the order directing the amendment will not, in dealing with costs, have the effect of depriving the party whose pleading is to be amended of the entire fruits of the amendment is not necessarily in itself a sufficient reason for declining to direct the amendment. By analogy, an application by a party for leave to amend which is proper to be allowed will not be refused merely because it would not be possible by an order as to costs to deprive the applicant of the fruits of the amendment, else no purpose would be served by a party obtaining leave to amend. This objection also fails.

The matters put forward in the counter-claim, as it stands and as it was understood by both counsel, clearly imply, but do not strictly contain, an assertion to the effect that the driver of the plaintiff's car (whosoever he may have been) was the servant or agent of the plaintiff (who is a corporation sole) and was acting within the scope of his authority, and if there should be any doubt as to the legal position of the driver the resolution of that doubt will constitute an essential issue in the suit and will therefore be one of the "real questions in controversy between the parties" within the meaning of O. 6, r. 18. Whether in fact the plaintiff will seek to contest this issue remains to be seen but, after careful consideration of the several matters to which I have referred and the somewhat special circumstances of the case, I am satisfied that it is necessary for the purpose of raising and determining the issue and removing the imprecision with which the counter-claim was drafted that the counterclaim be amended in the manner set out below and I so direct. The defendant must within fourteen days from this date serve on the plaintiff a copy of the amended counter-claim, and, although I think it is unlikely that the plaintiff will require to file an amended defence to the counter-claim, he must nevertheless have an opportunity so to do and I will allow for this purpose fourteen days after the service on him of such amended counter-claim. When the amended pleadings shall have been closed either party shall be at liberty, upon giving reasonable notice to the other, to have the case set down for further hearing before me at Nairobi (where I am now sitting) at which each party shall be

allowed to adduce such evidence as he may wish relevant to any issue raised for the first time by the new pleadings.

The amended counter-claim will be in the following terms, based upon the amendment sought by the defendant:

“B – Counter-claim

1. The defendant avers that on or about the 28th day of September, 1966 at approximately 7.30 a.m. the defendant was involved in a motor accident with a vehicle driven by the plaintiff's servant or driver in the course of his employment and avers that such motor accident was occasioned through the sole negligence of the plaintiff's said servant.

Particulars of Negligence

- (1) Failed to keep his correct side of the road when approaching an on-coming vehicle thereby forcing the defendant to drive to the off-side of the road in an attempt to avoid the plaintiff's said servant who at the same moment endeavoured to return to the correct side and collided with the defendant.
 - (2) Failed to apply or properly to apply his brakes.
 - (3) Failed to keep a proper look out.
2. As a result of the plaintiff's servant's said negligence the defendant suffered special damages.

Particulars of Special Damages

Pre-accident value of motor vehicle	Shs 17,000.0
Less scrap sale value	Shs 4,737.00
	<hr/>
	Shs 12,263.0
	<hr/>

3. The defendant therefore claims from the plaintiff the sum of Shs. 12,263.00 representing the loss he has suffered by reason of the said motor accident.”

The costs of or occasioned by the amendment are reserved and the further hearing of the suit is adjourned to such day as may be fixed in the manner mentioned above. In the meantime each party shall have liberty to apply in chambers at Nairobi for any directions that may be thought to be necessary for the purpose of giving effect to this order.

Order accordingly.

For the plaintiff

SM Otieno

Legal Secretary, EACSO

For the defendant:

BR Paterson-Todd

BR Paterson-Todd, Nakuru

Karuru v Njeri
[1968] 1 EA 361 (HCK)

Division: High Court of Kenya at Nakuru
Date of judgment: 28 February 1968
Case Number: 138/1967 (79/68)
Before: Simpson J
Sourced by: LawAfrica

[1] Customary Law – Custody of children – Divorce – Kikuyu custom that children go to father unless return of bride-price demanded – Whether to be applied by High Court – Judicature Act, s. 3 (2) (K.).

[2] Matrimonial Causes – Custody of children – Kikuyu marriage – Divorce – Return of bride-price not demanded – Custom that children go to father – Whether custom to be applied by High Court.

Editor's Summary

This was a second appeal by a husband from an order of the Molo African Court which awarded custody of two of the four children of the marriage to the wife in a divorce case. On this appeal the High Court called evidence as to Kikuyu custom, by which the parties had been married. This evidence was that, in the circumstances of this case, the children would by custom go to the father because he had not demanded the return of the bride-price.

Held – this custom was not repugnant to justice and morality nor inconsistent with any written law; and the court must therefore be guided by it in spite of the possible effect on the children.

Appeal allowed.

No cases referred to in judgment

[Editorial Note: This case was not argued by counsel and the attention of the court does not seem to have been drawn to s. 17 of the Guardianship of Infants Act, a written law with which the custom concerned would appear, it is submitted, to be inconsistent.]

Judgment

Simpson J: The respondent, Helena Njeri, successfully sued the appellant, Simion Karuru for divorce in Molo African Court. The court awarded custody of two of the four children of the marriage to the respondent.

The appellant appealed from that order to the Court of the 1st Class Magistrate, Eldoret. The appeal was dismissed and he now appeals to this court.

The parties are Kikuyus and Christians. The marriage however was not a Christian marriage.

In his judgment the magistrate said:

“I have also sought the opinion of Kikuyu elders as to the Kikuyu customs. I am made to understand that according to Kikuyu customs where there is divorce the children belong to the mother and all bride-price paid is recovered by the husband.”

No evidence was adduced in support of this custom. I accordingly called an expert on Kikuyu customs to confirm this understanding of the magistrate.

He said however that according to Kikuyu custom on divorce the children go to the father unless the father demands the return of the bride-price in which case they go to the mother provided the bride-price is returned in full. The

magistrate found that the bride-price had been paid in full and there is undoubtedly evidence to support such a finding. The return of the bride-price is not demanded.

The magistrate's understanding of Kikuyu customs would therefore appear to be wrong. Yet his decision, as was the decision of the African Court, was eminently reasonable.

Section 3 (2) of the Judicature Act (No. 16 of 1967) provides:

"The High Court and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

The paramount consideration in custody matters is the welfare of the child. An inflexible custom such as this one gives no consideration to the welfare of the children of the marriage. The custom in question is however applicable to the present case and the parties are subject to it. The court must therefore be guided by it unless it is repugnant to justice and morality or inconsistent with any written law. I am not prepared to hold that it is repugnant to justice and morality and I know of no written law with which it is inconsistent.

If the magistrate had been properly informed as to customary law he would I think have been guided by it and would have awarded custody of all the children to the father.

In his judgment he said:

"I personally feel that if children are left in the hands of the father they would later on become better persons than if they were to be looked after by the mother."

It is clear that he did not altogether approve of the custom of which he had been wrongly informed.

I conclude therefore with some regret that the appeal must be allowed despite the emotional disturbance it may cause in the two eldest children who are at present with the respondent and the possible interruption in their education. The respondent does have a remedy if she chooses. She is free to accept the appellant's offer to take her back.

The order of Molo African Court is amended by the deletion of the words:

"also the children named below:

1. Tafidha Wanjiku
2. Leah Wanjiku."

The remainder of the order stands.

The respondent will pay the appellant's costs in this court and in the court below.

Order accordingly.

The parties appeared in person.

Division:	Court of Appeal at Kampala
Date of judgment:	23 September 1967
Case Number:	33/1967 (162)
Before:	Sir Charles Newbold P, Sir Clement De Lestang V-P and Duffus JA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Jones, J

[1] Criminal Practice and Procedure – Confession – Whether judge has to satisfy himself it is voluntary before admitting it into evidence – Practice where accused unrepresented – Whether judge or assessors to decide if voluntary or not.

[2] Evidence – Extra-judicial statement – Confession to police – Practice where accused unrepresented – Whether judge or assessors should decide if made voluntarily.

Editor’s Summary

The trial judge admitted into evidence a statement made by an accused after the accused had been charged and cautioned by an assistant inspector of police without enquiring from the accused, who was unrepresented, if it was voluntary. The accused cross-examined the assistant inspector to the effect that the statement had been extracted by violence and had been taken in a language not the choice of the accused. Subsequently the assessors, after being addressed by the judge, expressed their opinion that the statement was voluntary and in the language chosen by the accused. Based on his statement and other evidence the accused was convicted of robbery with violence. On appeal it was contended (*inter alia*) that the judge misdirected himself in law in not deciding whether the statement was voluntary before admitting it into evidence and in allowing the assessors to decide if it was voluntary.

Held –

- (i) it is a desirable practice, but not a rule of law, for the judge to discover from an unrepresented accused if the admissibility of a statement made by him is objected to;
- (ii) it is for the judge alone to determine its admissibility in the absence of the assessors;
- (iii) but the wrong procedure adopted in this case had not occasioned a substantial miscarriage of justice.

Appeal dismissed.

No cases referred to in judgment

Judgment

Sir Charles Newbold P: read the following reasons for the judgment of the court: The appellant, John

Lwasa, was convicted by the High Court of robbery contrary to ss. 272 and 273 (2) of the Penal Code and was sentenced to ten years' imprisonment and fifteen strokes. He appealed against his conviction and sentence. We dismissed the appeal and stated that we would give our reasons for our decision in writing at a later date, which reasons we now give.

Mr. Wilkinson, who appeared for the appellant, urged two main grounds on which he submitted that the appeal should be allowed and the conviction quashed. The first was that the trial judge had seriously misdirected himself in law in that he had allowed a statement taken from the appellant after he had been charged and cautioned, which statement amounted to a confession, to be put in evidence before he had determined whether it was voluntary and had

cast upon the assessors the duty of determining whether the statement was a voluntary one. The second was that the evidence as a whole was so unsatisfactory and contained so many discrepancies that it would be most unsafe to maintain the conviction.

Dealing with the first ground, the relevant facts are that an assistant inspector of police, Mariano Ojok, gave evidence that on July 8, 1966, the appellant, after being charged and cautioned, elected to make a statement in Swahili, which statement was read back to the appellant and accepted as being an accurate record of what he had said. The witness then tendered the statement and it was put in evidence. At no stage does it appear from the record that, prior to the statement being put in evidence, the judge asked the appellant, who was unrepresented, whether he objected to the statement being put into evidence. The appellant then cross-examined the police officer and the entire cross-examination was related to the fact that the statement had been extorted from the appellant by violence and had been taken in a language which had been determined by the police officer and not by the appellant. The notes of the address by the judge to the assessors are brief and it is not clear precisely what the assessors were asked to consider in relation to the confession, but in the reply of each of them the assessors stated that the statement was made voluntarily and in a language chosen by the appellant. In his judgment the trial judge stated that he specifically asked the assessors whether the statement was in any way an involuntary one and whether the appellant had elected to speak in Swahili.

While there is no rule of law which requires a judge to ascertain, when an accused is unrepresented, whether a statement which is tendered by the prosecution is objected to on any ground which would make it inadmissible in law, nevertheless this is a common practice of judges. We think the practice most desirable, as it is the duty of a judge to ensure that inadmissible evidence is not admitted. If the judge does not make such enquiry before the admission of the statement, then it may well be that the subsequent evidence may prove the statement to be inadmissible; and while the judge may direct himself and the assessors to disregard the statement, nevertheless, as far as the assessors are concerned at least, considerable prejudice may have been caused to the accused. The judge did not follow that practice in this case. Subsequent to the admission of the statement there were questions asked of the police officer which tended to raise the issue of whether the statement was admissible; and the sworn testimony of the appellant clearly raised that issue. At no stage prior to his judgment did the judge rule on the admissibility of the statement; and where the issue of admissibility has been raised it is for the judge, and he alone, to determine whether the statement is admissible. If he arrives at the conclusion that it is admissible by the reason of being voluntary and in conformity with the law relating thereto, which conclusion should be arrived at before the address to the assessors, it is not for him then to place, as he did in this case, upon the assessors the duty of tendering advice on whether the statement was voluntary and in conformity with the law. All that the assessors can be asked to determine is whether they believe the truth of the contents of the statement; and in arriving at a conclusion on that point it is proper for them to determine the weight to be given to the statement by reason of the circumstances in which the statement was taken. It is for this reason that, where a judge has ruled following a trial within a trial that a statement is admissible, when the assessors are recalled the evidence of the police officer that the statement was given voluntarily following a caution is again taken and it is open to the defence to raise any circumstances which show that the statement was taken in circumstances which would affect the weight to be given to it. As we have already pointed out the judge failed to follow the proper procedure. The failure of the judge

to rule on the admissibility of the statement after its admissibility had been placed in issue and the fact that the judge apparently placed on the assessors the determination of its admissibility, a question of law, was undoubtedly a misdirection. The question whether this irregularity had occasioned a substantial miscarriage of justice depended upon a consideration of the second ground urged by Mr. Wilkinson.

While there were undoubted discrepancies in the evidence of the witnesses, we did not consider that those discrepancies could be regarded as material if the evidence of Daniel Lumunye was accepted as truthful. According to his evidence very shortly after the robbery the appellant was discovered running and was seized by the witness with the help of dogs; the appellant thereupon drew a knife but was overpowered and when searched had on him a shirt belonging to the person robbed; and the appellant then took the witness to a place where trousers belonging to the person robbed were found. Both the assessors specifically said that they believed the witness and so did the judge. We saw no reason to come to a contrary conclusion. This evidence was quite clear and, if believed, the appellant must have been convicted of robbery whether or not the statement had been admitted in evidence. As Lumunye's evidence was in fact believed the irregularity in relation to the statement did not occasion any substantial miscarriage of justice and accordingly we saw no reason to allow the appeal on account of that irregularity and we dismissed the appeal.

Appeal dismissed.

For the appellant:

PJ Wilkinson, QC and A Mayanja
Abu Mayanja & Co, Kampala

For the respondent:

G Masika
Attorney-General, Uganda

Ssentale v Uganda [1968] 1 EA 365 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	25 March 1968
Case Number:	56/1968 (65/68)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal Law – Alibi – No burden of proof on accused – Misdirection by magistrate.*

[2] *Criminal Practice and Procedure – Identification parade – Rules for conduct of – R. v. Mwango s/o Manaa.*

Editor's Summary

The appellant was convicted in the magistrate's court of robbery, contra s. 272 of the Penal Code in that about 11.30 p.m. on September 2, 1967, he attacked the complainant and by violence removed and ran off with her sweater. The appeal was based on two grounds: (i) that there was no proper evidence of identification and (ii) that the magistrate did not properly direct himself on the issue of the burden of proof relating to an alibi raised by an accused person. The complainant gave evidence in regard to her identification of the appellant and stated that she was taken into the police office and found that six persons were standing in a row with the appellant seated in front of them. She picked the appellant as her assailant. The appellant's defence was that he was not in the area on the night on which the offence was committed and did not return to that area until September 4, 1967, only eight hours before he was arrested. The police made no attempt to check the truth of this statement although the

statement was made in regard to his alibi at the time of his arrest. The appellant also stated, under cross-examination, that he had previously let a room in his house to the lady-friend of the police sergeant who arrested him but had recently ejected her from his house for failure to pay rent.

The learned magistrate in his judgment rejected the appellant's alibi and said: "He told the police to confirm the alibi and the police refused to do so. He failed to substantiate his alibi in this court." The learned magistrate did not deal with the evidence in regard to the relationship between the appellant and the police sergeant.

Held –

- (i) the identification parade was held in a manner contrary to the rule approved by the Court of Appeal in *R. v. Mwangi* (3);
- (ii) an accused person who puts forward an alibi as an answer to a charge does not assume any burden of proving that answer; and it is a misdirection to refer to any burden resting on the accused in such a case;
- (iii) the magistrate should have directed his mind to the evidence given by the appellant in regard to his previous relationship with the police sergeant who arrested him.

Appeal allowed. Conviction and sentence quashed.

Cases referred to in judgment:

- (1) *R. v. Anthony Hugh Johnson* (1962), 46 Cr. App. Rep. 55.
- (2) *Leonard Aniseth v. Republic*, [1963] E.A. 206.
- (3) *R. v. Mwangi s/o Manaa* (1936), 3 E.A.C.A. 29.

Judgment

Sir Udo Udoma CJ: The appellant, Yowana Krizesitomu Ssentale, was convicted by the magistrate grade I, Magistrate's Court, Mengo, of robbery contrary to s. 272 and punishable under s. 273 (1) (b) and s. 274 A of the Penal Code. He was sentenced to four years' imprisonment and six strokes of the cane. He now appeals against the conviction and sentence.

In his petition of appeal, he has severely attacked the decision of the magistrate in convicting him. The substance of the attack may be summarised under two main heads, namely:

- (1) that there was no proper evidence of identification before the court; and
- (2) that the decision is erroneous in law in that the learned trial magistrate did not properly direct himself on the issue of alibi raised by him in relation to the burden of proof in a criminal case.

The facts which emerge from the evidence were briefly that on September 2, 1967, at about 11.30 p.m. Nora Namusoke a ward maid working in the Mityana Dispensary at the close of her work was returning to her home in Mityana village. On her way she was attacked by someone she had never known before but whom she alleged was the appellant. According to her the incident happened in this way: As she was walking along the road at that time of the night the appellant accosted her. He then caught hold of her hand and at the same time asked her where she was coming from. Before she could answer the question

the appellant held her by her neck and threw her down on the ground on the road. She managed to get up and there and then raised an alarm. The appellant immediately caught hold of her again and threw her down on the ground for the second time; and successfully removed from her person her sweater with a split front with a number of buttons to button it up, if required. At the same

time the appellant boxed her forehead. She suffered injuries on both her elbows and knees as a result of her having been thrown down by force. She also injured her right ring finger. She continued to raise an alarm.

A number of persons were, as a result, attracted to the scene, among whom was Emanuel Hobson Damulira, a Land Registry assistant. The latter had visited the Mityana Hospital that night. As he came out of the hospital and was about to kick his car started, he heard an alarm. He alighted from his car and rushed towards the direction of the alarm. On arriving at the scene he met Nora Namusoke. At the same time he also noticed someone running away from the scene and carrying something in his hand. Nora Namusoke then pointed at the person who was still running away as the person who had attacked her and had successfully gone away with her sweater, because as soon as the appellant saw that some people were approaching the scene, he broke himself loose from Nora Namusoke and made good his escape. Somehow when Damulira was interrogating Nora Namusoke as to what had happened to her he overheard the man who was still on the run say in a hoarse voice from a distance: "I was here".

Damulira could not see the man's face. He only saw his back and therefore could not recognise him although it was a moonlight night and there were street lights along the road in the area.

Nora Namusoke had to go back to the dispensary for the treatment of her injuries. Thereafter she reported the matter to the police that same night at the Mityana police station. In the course of her report she mentioned that her attacker was dressed in a white shirt with the sleeves rolled up and a pair of long trousers which also appeared to have been pulled up. She told the police that she could recognise the person if she saw him again as she was able to take a good look at him at the spot where she was attacked because there were street lights there.

On September 4, 1967, at the request of Detective Sergeant No. 217 attached to the Mityana police station, Nora Namusoke gave a description of the person who had attacked her to him. Thereafter a number of persons were arrested and were brought together into the police office. On September 5, 1967, all the suspects were arranged in such a way that out of the seven persons arrested six of them were seated on a bench in the office while the appellant alone was seated on the floor. At the invitation of the police, Nora Namusoke reported at the Mityana police office. She was asked to point out among the seven persons there in the office who was her attacker. On entering the office she immediately picked out the appellant, who, as already stated, was the only person sitting on the floor.

Thereafter the appellant was arrested and charged. After due caution he made a statement denying the charge. He was detained by the police and later had to face his trial before the magistrate.

In his defence the appellant swore that he was wrongly charged with the offence as he knew nothing about it. He stated that he was brought to the police station by Detective Sergeant Stephen Sebanya No. 217 under false pretences; that when Detective Sergeant Sebanya met him in the town he had invited him to the police station under the pretext that he was wanted for a case, which had already been tried and in which he was convicted and sentenced to two months' imprisonment, on the ground that the complainant in that case had appealed against the sentence imposed upon him. But at the police station he was informed by another police officer, Detective Corporal Elias Mpagazihye that he was wanted for having assaulted two persons, namely Nora and Kasera. When the police brought Kasera to the police station and she was questioned as to whether he, the appellant, was the person who had assaulted her, Kasera

had said that he was not the one because she knew the person who had assaulted her.

At the trial the appellant also set up an alibi. He said that, on being arrested by the police, he had told them that from August 14, 1967, to September 4, 1967, he was at Mubende with his father and not at Mityana, and that he only returned to Mityana on September 4, 1967, by bus at about 3 a.m.; that he was arrested at about 11.40 a.m. that day and taken to the police station; that he had made request to the police that they should test his alibi by enquiring into his movements but that the police had refused and failed to do so; and that Detective Sergeant Mpagazihye had rented a room in his house for his lady friend and was angry with him when he ejected the lady from the room for failure to pay her rent; and that that was the reason why the police had picked upon him as the assailant of Nora Namusoke.

It should be noted that this important piece of evidence was elicited under cross-examination by the prosecution and was of material importance in the case. There was no attempt made to refute it.

In his judgment the learned trial magistrate, on a review of the evidence, said:

“His defence is a mere denial. In his cross-examination he stated that on the alleged date of the incident, that is, September 2, 1967, he was at Mubende at his father’s place and only returned to Mityana during the night of September 4, 1967. He had told the police to confirm about it but the police refused to do so. He had failed to substantiate his alibi in this court. The accused has not impressed me at all and I have no doubt whatsoever that his defence was a tissue of lies and I reject it.”

The above quoted passage in the judgment of the learned trial magistrate constitutes a misdirection in law. The manner in which the learned trial magistrate had expressed the failure of the appellant to satisfy him on the alibi raised by him in his defence appears to have thrown the burden of proving his innocence on the appellant, thereby absolving the prosecution from their duty of proving their case beyond reasonable doubt. The burden in a criminal case never shifts. That apart, the answer of alibi was raised at the first available opportunity, which was immediately the appellant was arrested. It was therefore the bounden duty of the prosecution or the police, who had investigated the case, to have checked and tested it. But this the police not only refused but failed to do even at the request of the appellant. The learned trial magistrate never directed his mind to this aspect of the case. If the alibi had been raised for the first time at the trial then different considerations might have arisen. This aspect of the defence is of great significance and was sufficient to have raised doubts in the mind of the learned trial magistrate, the benefit of which should have gone to the appellant.

In *R. v. Anthony Hugh Johnson* (1962), 46 Cr. App. Rep. 55, and *Leonard Aniseth v. Republic*, [1963] E.A. 206, it was stated as a matter of law that, although the court must of necessity examine an alibi when raised by way of defence by an accused person, and that, although an alibi is commonly called a defence, it is to be distinguished from statutory defences such as insanity or diminished responsibility and analogous to a defence such as self-defence or provocation. A prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; and it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution.

The second ground deals with the vital question of identification. On the evidence no proper identification was conducted by the police. There was no

identification parade. If there was a case in which an identification parade was essential this was it. The robbery took place at near midnight, although there was moonlight as well as street lights. The assailant was never known to the complainant prior to the incident. It was irregular to have packed seven people into one room, that is, the police office, and to arrange them in such a way that out of the seven people present, six were seated on a bench in the office, and the appellant alone was seated on the floor; and thereafter to have asked Nora Namusoke to go into the office and identify the person whom she held had attacked her in the night of September 2, 1967. The manner in which the so-called identification parade was conducted was contrary to the rule of identification approved by the Court of Appeal for Eastern Africa in the case of *R. v. Mwangi s/o Manaa* (1936), 3 E.A.C.A. 29.

In that case the Court of Appeal approved of the method of identification which was set out in Kenya Police Order No. 15/26 and approved by the then Chief Justice of Kenya.

The rules are headed "Instruction for Identification Parades" and are as follows:

1. That the accused person is always informed that he may have a solicitor or friend present when the parade takes place.
2. That the officer in charge of the case, although he may be present, does not carry out the identification.
3. That the witnesses do not see the accused before the parade.
4. That the accused is placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself or herself.
5. That the accused is allowed to take any position he chooses, and that he is allowed to change his position after each identifying witness has left, if he so desires.
6. Care to be exercised that the witnesses are not allowed to communicate with each other after they have been to the parade.
7. Exclude every person who has no business there.
8. Make a careful note after each witness leaves the parade, recording whether the witness identifies or other circumstances.
9. If the witness desires to see the accused walk, hear him speak, see him with his hat on or off, see that this is done. As a precautionary measure it is suggested the whole parade be asked to do this.
10. See that the witness touches the person he identifies.
11. At the termination of the parade or during the parade ask the accused if he is satisfied that the parade is being conducted in a fair manner and make a note of his reply.
12. In introducing the witness tell him that he will see a group of people who may or may not contain the suspected person. Don't say, "Pick out somebody", or influence him in any way whatsoever.
13. Act with scrupulous fairness, otherwise the value of the identification as evidence will depreciate considerably.

In these circumstances the State Attorney, Mr. C. B. Patel, was right in not seeking to support the conviction of the appellant when this court drew his attention to the irregularities both in the evidence of the witnesses for the prosecution and in the judgment of the trial magistrate.

This appeal therefore succeeds. It is allowed. The conviction and sentence are quashed. The appellant is acquitted.

Order accordingly. Appeal allowed.

No appearance for the appellant.

For the respondent:

CP Patel (State Attorney, Uganda)

Director of Public Prosecutions, Uganda

Uganda v Lubega
[1968] 1 EA 370 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	25 March 1968
Case Number:	61/1968 (66/68)
Before:	Sir Udo Udoma CJ
Sourced by:	LawAfrica

[1] *Criminal Practice and Procedure – Licensing of prisoner – Prisons Act, s. 49 – Magistrate ordering issue of fresh licence to accused – Prisons Act, s. 50 (U.).*

Editor's Summary

The accused was released on licence on May 14, 1966 under s. 49 of the Prisons Act of Uganda and failed to report to a Police Station under the terms of conditions of the issue of the licence. On enquiry, the police found that the accused had been committed to prison on January 28, 1967. The accused was brought before the magistrate's court under s. 50 (4) of the Prisons Act and a sentence of three months' imprisonment for failure to comply with the conditions of the licence was imposed upon him. The magistrate's order then went on: "and the conditions of the first licence shall prevail subject to that. He shall again be issued with a fresh licence on equivalent terms as those which were in the licence." The Director of Public Prosecutions applied for a revisional order.

Held –

- (i) the learned trial magistrate acted ultra vires in issuing such an order; and
- (ii) the magistrate erred in law in ordering a fresh licence to be issued to the accused;
- (iii) the magistrate, in terms of s. 50 (5) and (7) should have issued a warrant for the re-commitment of the accused to prison to serve another 1½ years, being the residue of his unexpired terms of

imprisonment when he was released on licence.

Case remitted to magistrate.

No cases referred to in judgment

Judgment

Sir Udo Udoma CJ: This is an application by the Director of Public Prosecutions for a revisional order to set aside the order which was made by the magistrate grade I in the Magistrate's Court, Mbarara.

The ground upon which this order is sought is that the order made by the learned trial magistrate was illegal and should be set aside, and an appropriate order be substituted therefor.

The point involved in this application is a very short one. The accused was on July 3, 1967, charged with the breach of the conditions of his licence contrary to s. 50 (4) of the Prisons Act.

The case was tried by the magistrate grade I, Magistrate's Court, Ankole. The case of the prosecution was that the accused was a prisoner at Murchison Bay Prison from November 8, 1962 to May 14, 1966, having been found guilty of the theft of a bicycle, convicted and sentenced to five years' imprisonment. On May 14, 1966, he was released only on licence under s. 49 of the Prisons Act as the accused was a well-known habitual criminal. One of the terms of the licence was that since the accused had told the prisons authorities that he was going to live permanently at Nagguru area, he must report his whereabouts to the nearest police station every month, in this case to the Jinja Road Police Station.

The police in Jinja Road Police Station were also served with a copy of the licence for their information and necessary action if the need should arise.

It was the case of the prosecution that the accused had committed a breach of his licence because since his release on licence he never at any time reported his whereabouts to the police at the Jinja Road Police Station. On enquiry by the police, it was discovered that on January 28, 1967, the accused was again convicted and sentenced to three months' imprisonment. He was then sent to Murchison Bay Prison there to serve his new term. On March 3, 1967, he was transferred to Kiburara Prison there to complete his term.

In his unsworn testimony the accused denied having been released under a licence. He admitted, however, that on November 8, 1962, he was convicted and sentenced to imprisonment for five years. He denied that he ever served the sentence at Murchison Bay Prison. He said that he was serving that term in Luzira Prison, whence he was transferred to Bihanga; and that at Bihanga the chief of the Prisons Authorities there had told him that he would be released on licence, and that he would be given a book containing his licence, when it was time for him to be released.

The accused further stated that his thumb print was then taken but soon thereafter he was again transferred back to Luzira Prison, where he was released on May 14, 1966, but without being issued with any licence; and that he was being charged for having committed a breach of his licence because he was now in prison again for having committed another offence.

The magistrate in his brief judgment said, to use his own words:

"Having heard the evidence addressed by the prosecution and the defence put up by the accused, I am satisfied that the accused committed a breach of the conditions (sic). The accused is convicted of the offence, contrary to s. 50 (4) of the Prison(s) Act. Accused is sentenced to a further three months and the conditions in the first licence to prevail, subject to that. He shall again be issued with a fresh licence on equivalent terms as those which were in the licence."

I must confess that it was difficult to understand what the magistrate meant when he said: "Accused is sentenced to a further three months and the conditions in the first licence to prevail, subject to that", having regard to the sentence which follows immediately thereafter.

Be that as it may the Director of Public Prosecutions has rightly complained that the learned trial magistrate had no jurisdiction on the conviction of the accused under s. 50 (4) of the Prisons Act to have ordered the issue of a fresh licence to the accused, since he had found him guilty; and that the order was illegal and should be set aside.

The relevant provisions of s. 50 (4) of the Prisons Act are as hereunder set forth:

- “50 (4) If a prisoner released on the licence granted under the provisions of this section is convicted of any offence or fails to comply with any of the conditions of his licence by any act or omission that is not of itself an offence, he shall be liable on conviction before a magistrate to imprisonment for a period not exceeding three months and to have his licence forfeited by order of such magistrate.

It is plain that in terms of the above provisions the learned trial magistrate acted ultra vires his powers under the section.

He erred in law to have ordered that a fresh licence be issued to the accused. The order was therefore illegal. The appropriate order which ought to have been made on the conviction of the accused was, in addition to the three months' imprisonment imposed by the magistrate, to order the forfeiture or revocation of the licence, under which the accused was released. In which event the provisions of s. 50 (5) and (7) would by the operation of law be invoked.

Section 50 (5) provides:

- “(5) Where any licence under this section is forfeited or revoked, the prisoner whose licence is forfeited or revoked shall, after undergoing any other punishment to which he has been sentenced, undergo a further term of imprisonment equal to the portion of his imprisonment as remained unexpired at the date of his release on licence, calculated without any remission previously earned or granted.”

and sub-s. (7) reads:

- “(7) Whenever a licence is forfeited by order of a magistrate under sub-s. (4) of this section such magistrate shall make out a warrant for the recommitment of such person to prison to undergo the residue of his sentence as remained unexpired at the date of his release under licence calculated without any remission previously earned or granted.”

In view of the above provisions, at the time of his release under licence the accused had still 1½ years to serve in order to complete his term of five years' imprisonment. Therefore apart from the conviction of the accused and the imposition of three months' imprisonment on him and the forfeiture of his licence the magistrate ought to have issued a warrant under his hand and seal for re-commitment of the accused to prison, there to serve for another 1½ years being the residue of his unexpired term of imprisonment when he was released on licence.

For the above reasons the order made by the magistrate in the penultimate sentence of his judgment is hereby set aside, and the application for revision succeeds.

It is ordered that the case be remitted back to the learned trial magistrate to comply with the provisions contained in s. 50 (5) and (7). Order accordingly. Court below to carry out this order.

No appearance for the accused.

For the respondent:

CP Patel (State Attorney, Uganda)

Director of Public Prosecutions, Uganda

[1968] 1 EA 373 (HCU)

Division: High Court of Uganda
Date of judgment: 2 April 1968
Case Number: 43/1968 (67/68)
Before: Sir Udo Udoma CJ
Sourced by: LawAfrica

[1] *Criminal Law – Corruption by public officer – Essentials of offence – Whether consists of agreement to be influenced – Whether demand relevant – Penal Code, s. 78 (U.).*

[2] *Criminal Practice and Procedure – Revisional order – Whether chief magistrate can apply to High Court for revision of conviction made by magistrate grade I – No appeal by accused – Jurisdiction of Court – Magistrates’ Courts Act, ss. 1, 10 and 30; Criminal Procedure Code, ss. 340 (1) and (2) and 341 (5) (U.).*

[3] *Jurisdiction – High Court – Revision in criminal case – Jurisdiction to hear application for revisional order brought by chief magistrate against conviction by magistrate grade I – No appeal by accused.*

Editor’s Summary

The accused, a magistrate grade III, was charged before the magistrate, grade I, in the magistrate’s court at Jinja with corruption by a public officer contrary to s. 78 (1) of the Penal Code. The evidence against him was that he was engaged in trying a case in which one Maganda was the defendant; that he asked Maganda for a bribe of Shs. 100/- and matoke; that Maganda reported this to the police, who laid a trap; and that Maganda, in sight of the police, handed to him an unsealed envelope containing Shs. 30/- in marked notes which he pocketed and which was found on him when he was searched by the police. In his defence the accused denied that he had asked for a bribe or that he knew that the envelope contained money; he admitted getting the envelope but said that Maganda had told him it contained a letter for him (which was inconsistent with what he had said earlier in a statement to the police) and that he had asked Maganda to get him some matoke to buy. He was convicted by the magistrate grade I and sentenced to a fine of Shs. 400/- with 6 months’ imprisonment in default. The chief magistrate, Jinja, then brought this application for a revisional order of the High Court to quash the conviction. The chief magistrate complained that the conviction was wrong on the grounds, *inter alia*, that what the accused had received was not what he had asked for; and that the essence of the offence under s. 78 (1) is the agreement to allow one’s conduct to be influenced and there was no evidence that the accused made any such agreement on the date specified in the charge. At the hearing of this application the State raised three preliminary objections:

- (i) the High Court had no jurisdiction, under s. 340 Criminal Procedure Code, because a magistrate grade I and a chief magistrate have concurrent jurisdiction (except as to sentence);
- (ii) the application was incompetent having regard to s. 30 of the Magistrates’ Courts Act and s. 341 (5) of the Criminal Procedure Code because the accused had not appealed; and

- (iii) the procedure was irregular, amounting to an appeal rather than an application for a revisional order.

Held –

- (a) all the preliminary objections failed because:
 - (i) the chief magistrate's court is superior to the court of a magistrate grade I; and a chief magistrate has power to apply to the High Court for a revisional order on the judgment of a magistrate grade I under s. 340 (1) and (2) Criminal Procedure Code;

- (ii) the chief magistrate could not have appealed against the conviction of the accused and was therefore not barred from bringing this application by s. 341 (5) of the Criminal Procedure Code;
 - (iii) the procedure adopted was proper under s. 340 (2) of the Criminal Procedure Code.
- (b) on the merits:
- (i) the question of what the accused had asked for was irrelevant; the essence of the offence is the agreement or offer to permit the accused's conduct to be influenced;
 - (ii) the acceptance of a gift by a public officer for the purpose of showing favour to any person is sufficient to constitute the offence, although there may not have been any particular arrangement between the donor and the recipient;
 - (iii) the conviction was supported by the evidence.

Application dismissed, subject to slight variation of sentence.

Case referred to:

- (1) *Uganda v. Jackson Rubakuba*, High Court Criminal Appeal No. 1105 of 1957 (unreported).

Judgment

Sir Udo Udoma CJ: This application is made by the chief magistrate, Jinja, in the Jinja magisterial area for an order of this Court to quash the conviction of and the sentence imposed upon the accused, Mesusera Mukhalwe, by the magistrate grade I, Magistrate's Court, Jinja. The application is opposed by the Director of Public Prosecutions. At the hearing the accused did not appear. The Director of Public Prosecutions was represented by Mr. C. P. Patel, State Attorney.

In support of his application that the conviction and sentence be set aside the learned chief magistrate advanced five reasons, namely:

- “(a) The particularity of the charge was so insufficient, that the accused could not possibly be in a position to meet the specific allegation which the prosecution intended proving for, from it, the accused could not tell if it was going to be alleged that he dropped a charge, frightened a witness, misplaced a file, unduly adjourned a case, or did any of a million other things, manifesting an influenced conduct.
- (b) The accused did not get the gift he was said to have demanded, that is Shs. 100/-, and even if he got Shs. 30/-, this was not the gift he had asked and was altogether so different as if he had asked for bread and received instead a brick.
- (c) What constitutes the offence under s. 78 (1) of the Penal Code Act is the agreement. There is not the slightest evidence that on September 18, 1967, the date alleged on the charge sheet, the accused agreed to do anything whatever with anyone, let alone with the complainant in the case.
- (d) The trial magistrate misdirected himself, when at p. 20 of the typed copy, he summed that [Maganda] agreed on September 18, 1967, to give the accused Shs. 100/-, there was not a scintilla of evidence to this effect, though there was some evidence that on that day, there was an act, as opposed to agreement, of [the complainant Maganda], of giving Shs. 30/- (as opposed Shs. 100/-) to the accused.

- (e) In the words of Goudie, J., in Criminal Appeal 1105 of 67 [*Uganda v. Jackson Rubakuba* (unreported)], . . . 'the accused is entitled to know how he is alleged to have allowed his conduct to be influenced . . .' As this indicates, the conduct of the accused must have already been influenced, at the time of the charge, and a promise or understanding that in some future, the conduct will be influenced will not do. In the instant case, there was no evidence at all that on September 18, 1967, the conduct of the accused was influenced."

On March 18, 1968, the application duly came up for hearing and determination. Before the commencement of hearing, however, Mr. C. P. Patel, State Attorney, on behalf of the Director of Public Prosecutions (hereinafter to be referred to as the respondent wherever appropriate) raised three preliminary objections in point of law.

Firstly, counsel submitted that the learned chief magistrate has no jurisdiction to have applied to this Court for a revisional order in a case which had been tried and determined by a magistrate grade I having regard to the provisions of s. 340 of the Criminal Procedure Code Act. Counsel, in his submission, maintained that both the chief magistrate and the magistrate Grade I have concurrent criminal jurisdiction and that the only difference between them is as to sentence. For whereas a chief magistrate could sentence a convicted prisoner up to ten years' imprisonment and twelve strokes of the cane, a grade I magistrate could only sentence a person to five years' imprisonment and twelve strokes of the cane.

Secondly it was contended by counsel that the application was incompetent and therefore should not be entertained by this Court since under s. 30 of the Magistrates' Courts Act an appeal lies as of right from both the chief magistrate and the magistrate grade I directly to this Court; and that, according to the terms of the provisions of s. 341 (5) of the Criminal Procedure Code Act, this Court is precluded from entertaining this application as the accused had failed to avail himself of the provisions of s. 30 of the Magistrates' Courts Act. Counsel contended that the accused had taken no step whatsoever to appeal against his conviction and sentence.

Thirdly counsel submitted that there is a fundamental irregularity in the form used and method adopted by the learned chief magistrate in bringing this application in that the purported application for revisional order is more in the nature of an appeal against the judgment of the magistrate than that of application for a revisional order.

I would now deal with these objections, which in my view are not only important but are also novel in that they do not appear to have been raised and argued before in this Court. No ruling, I believe, on any of these points appears in the Eastern Africa Law Reports.

In his submission on the first point of objection counsel contended that under s. 30 (1) (a) and (b) of the Magistrates' Courts Act appeals against the judgments, decisions or orders of a chief magistrate and magistrate grade I lie directly to this Court. An appeal against the judgment or order of a magistrate grade I does not lie to the court of the chief magistrate and therefore a chief magistrate has no right to interfere with the decision or judgment or proceedings in the court of a magistrate grade I as both courts have concurrent jurisdiction except as to sentence. A chief magistrate is empowered by law to impose a higher sentence on conviction than a magistrate grade I.

I am unable to accept this submission. I am in no way persuaded by it. I am of the view that it is not well-founded in law. Merely because appeals from the judgments, decisions and orders of a chief magistrate and a magistrate grade I

lie directly to this Court or the fact that both the chief magistrate and magistrate grade I have concurrent jurisdiction in criminal matters does not necessarily ipso facto mean that the two courts are equal in status. Pressed to its logical conclusion, this submission would amount to this: that because the High Court has concurrent jurisdiction with the courts of the chief magistrate and the magistrate grade I in cases involving robbery with violence, for instance, then the High Court and the two grades of magistrates' courts are equal in status, which of course would amount to a *reductio ad absurdum*.

Under s. 1 of the Magistrates' Courts Act, the chief magistrate is endowed with the power by law to exercise general supervision over all magistrates' courts in his area of jurisdiction, which would naturally include the court of a magistrate grade I. The relevant section of the Magistrates' Courts Act reads:

"A chief magistrate shall exercise general powers of supervision over all courts presided over by any other magistrate within the area of his jurisdiction."

The power thus granted to the chief magistrate is very wide indeed; and therefore brings all courts of all grades of magistrates, that is to say, courts inferior to chief magistrate within the area of jurisdiction of a chief magistrate, under the supervision of the chief magistrate.

Then there are the provisions of s. 10 (4) of the Magistrates' Courts Act which, read together with the provisions of s. 340 (1) and (2) of the Criminal Procedure Code Act, leave no room for doubt that the chief magistrate's court is of a higher status than and is superior to the court of a magistrate grade I. Section 10 (4) of the Magistrates' Courts Act specifically stipulates that magistrates grades I, II and III, on a conviction of an accused person, where they are satisfied that a greater punishment should be imposed, then they may commit the prisoner for sentence to a chief magistrate of the area. The powers of a chief magistrate over all other magistrates within his area or jurisdiction, are succinctly expressed in s. 340 (1) and (2) of the Criminal Procedure Code Act, which reads:

- "340 (1) Any magistrate may call for and examine the record of any criminal proceedings before a magistrate's court inferior to the court which he is empowered to hold, and situate within the legal limit of his jurisdiction, for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or other order recorded or passed and as to the regularity of any proceedings of such inferior magistrate's court.
- (2) If any magistrate acting under sub-s. (1) of this section considers that any finding, sentence or order of such inferior magistrate's court is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the High Court."

The objection by counsel for the respondent on this point is therefore overruled. I am satisfied and hold that the chief magistrate acted within the powers vested in him by law in forwarding to this Court the record of proceedings in the court of magistrate grade I and applying for a revisional order on the grounds hereinbefore set out in these proceedings. There could be no doubt whatsoever that the court of a magistrate grade I is inferior to a chief magistrate's court. I rule that this application is *intra vires* the power of the chief magistrate and that it is properly before the Court.

The second objection was that the application was misconceived and incompetent for noncompliance with the provisions of s. 30 of the Magistrates' Courts Act since the accused had failed to appeal against his conviction and sentence, and that this Court was therefore precluded from entertaining the application by virtue of the provisions of s. 341 (5) of the Criminal Procedure Code Act.

This contention is ill-founded. Indeed it is the submission which is misconceived and not the application. It is of course correct that under s. 30 of the Magistrates' Courts Act an appeal lies as of right to the High Court from the judgments, decisions or orders of the magistrate's court presided over by a magistrate grade I. It is also correct that under s. 341 (5) of the Criminal Procedure Code Act it is not competent for this Court to entertain an application for a revisional order where there is a right of appeal and the prisoner failed to appeal against his conviction and sentence.

Section 341 (5) provides:

"Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained *at the instance of the party who could have appealed.*"

The governing, controlling, definitive and operative phrase in the above quoted section must be: "*at the instance of the party who could have appealed*".

The question then arises: could the chief magistrate who now applies to this Court for a revisional order have appealed against the conviction and sentence imposed upon the convicted prisoner? The answer to that question must be in the negative. The application under consideration has been brought not by the person "who could have appealed" but failed to do so, but by the chief magistrate in Jinja, in the due performance of the duty imposed upon him by s. 5 of the Magistrates' Courts Act and s. 340 (1) and (2) of the Criminal Procedure Code Act. The chief magistrate was not a party to the proceedings in the magistrate's court and therefore could have no right to appeal against the judgment, decision and order given or made by the magistrate grade I. This objection is also overruled.

It was submitted by counsel under the third head of objection that the application was irregular and therefore not properly before the Court in that the form employed by the chief magistrate was more in the nature of an appeal than of a revision. It was difficult to follow the arguments advanced in respect of this objection. Section 30 of the Magistrates' Courts Act which regulates appeals to this Court does not prescribe directly the form which should be used when filing an appeal. The form in which an appeal should be brought before the High Court is only indirectly mentioned in s. 31 of the Magistrates' Courts Act and therein reference is made to s. 327 of the Criminal Procedure Code Act.

It is therefore only when one turns to s. 327 (1) of the Criminal Procedure Code Act that one is told that every appeal "shall be made in the form of a petition in writing presented by the appellant or his advocate", and shall be lodged with the registrar within fourteen days of the date of service of the judgment or order from which the appeal is preferred, on the appellant or his advocate.

The present application is not made in the form of a petition. On the other hand s. 340 (1) and (2) of the Criminal Procedure Code Act which deals with an application for an order in revision does not lay down any particular form to be used. Reference has already been made to the provisions of this section which have been set out in extenso above. It is therefore unnecessary to repeat them.

The application under consideration is headed:

“Criminal Case No. MJ. 1668 of 1967

Uganda v. Mesusera Mukhalwe.”

The first paragraph of the application reads:

“I forward to you herewith under cover of this letter in duplicate the record of the above mentioned case for an order in revision, quashing the conviction and setting aside the sentence of the lower court, which conviction and subsequent sentence appear to be in error for the following reasons:”

There then follow the reasons to which reference has already been made, the particulars of which have already been set out in these proceedings.

In s. 353 of the Criminal Procedure Code Act it is provided:

“Such forms as the Chief Justice may from time to time approve, with such variations as the circumstances of each case may require, may be used for the respective purposes herein mentioned, and if used shall be sufficient.”

In my view the form adopted by the chief magistrate in presenting this application cannot be faulted. It is in keeping with the requirements of s. 340 (2) of the Criminal Procedure Code Act. The reasons advanced can only properly be regarded as being in due compliance with the penultimate expression contained in the said sub-section of s. 340 of the Criminal Procedure Code Act. The reasons given by the chief magistrate in support of the application constitute the remarks which he is supposed to make when applying for a revisional order. The third objection is also without substance. It is overruled.

I now turn to consider the application on its merits and in terms of the reasons advanced in support thereof by the learned chief magistrate.

I consider it necessary that since the charge as framed is the subject of attack by the chief magistrate in his application, the said charge be set out in extenso in these proceedings.

The accused was charged with corruption by a public officer contrary to s. 78 (1) of the Penal Code. The charge as amended was laid in the form hereunder set forth:

“Statement of Offence

Corruption by public officer contrary to s. 78 (1) of the Penal Code.

Particulars of Offence

Mesusera Mukhalwe, on September 18, 1967 at Kiyunga village in Busoga district, being a person employed in the public service as a grade III magistrate, agreed to permit his conduct in such employment to be influenced by the gift of cash Shs. 30/- and two bunches in two pieces of matoke.”

The case of the prosecution in support of the charge was that in 1964 Augustine Maganda bought a piece of land from Yokosofati Nsada for Shs. 400/-. He then entered into possession of the said land and therein erected his dwelling-house wherein he still now dwells. Thereafter Maganda was sued for the recovery of the said land by one Perpebwa Mutesi. The action was dismissed and decision given in favour of Maganda by a magistrate in Gombolola Bukanga in 1966.

Then in July, 1967 Maganda was again sued over the same land by the same Mutesi – Suit No. 1 of 1967 – *Perpebwa Mutesi v. Augustine Maganda*. Mutesi’s action was dismissed. He appealed to the court of magistrate grade II and

succeeded. The magistrate grade II ordered a re-trial by the magistrate grade III, who happened to be the accused in the present case. On July 7 the case came up for re-trial. It was then No. 11/67 – *Perpebwa Mutesi v. Augustine Maganda*. The accused heard the evidence of the plaintiff Mutesi. At the conclusion of the plaintiff's evidence, Maganda did not give evidence but his witness Nsada gave evidence. The case was then adjourned to September 22, 1967, to enable the accused to view the land in dispute. Summonses were accordingly issued commanding both parties to appear in court on September 22, 1967.

On September 16, 1967, the accused met Maganda on the road and a conversation ensued between them, the result of which was that, on the invitation of the accused, Maganda called at the residence of the accused. That was between 10 a.m. and 11 a.m. on that day. In the course of their conversation, the accused told Maganda that his case was not a clear one, but that if Maganda could give him something he, the accused, was prepared to help him in the case. Finally the accused demanded Shs. 100/- from Maganda in order that he would help him in his case. Maganda agreed and promised to bring him the money on September 18, 1967, so that he, the accused, might help him to win the case. In addition the accused demanded matoke (banana) from Maganda. He told Maganda that when bringing the money he should also bring him some matoke and that the money should be placed in an envelope before the same be delivered to him.

On September 17, 1967, Maganda reported the demand made upon him by the accused to the police at Nakabugo Police Post. The report was made directly to Constable Livingstone Nsubuga between 9 and 10 p.m. The police thereupon decided to set a trap for the accused.

On enquiry Maganda told Constable Nsubuga that he had then only Shs. 30/- made up of three notes each of Shs. 10/- denomination. He passed the money to Constable Nsubuga. As it was then very late, at the request of the police Maganda spent the night at Nakabugo Police Post. The following morning, on the instruction of the police, Maganda fetched some matoke from his home. The matoke was tied to the back of his bicycle when he arrived back at the police post.

Constable Nsubuga there and then placed his initials "NL" within the digit 0 of the figure 10 within the left hand corners of the three notes. Constable Nsubuga also recorded the numbers of the three Shs. 10/- currency notes in his diary. He then put the three Shs. 10/- currency notes in an old envelope, exhibit 2, which was bluish in colour. The envelope had previously been used and was produced by Maganda. The envelope had no flap, it having previously been slit open. The money was then placed in the envelope in such a way that it was visible without the envelope being opened. The envelope was not closed or sealed.

At about 8.40 a.m. Constable Nsubuga and two other policemen took cover somewhere on the road between the accused's residence and the magistrate's court. On the advice of the police Maganda cycled towards the residence of the accused. He was then carrying the matoke on the back of his bicycle and had in his hand the envelope containing the Shs. 30/-. On the way he met the accused, who, on seeing Maganda cycling towards his home, stopped him. Maganda alighted from his bicycle. The matoke was still tied to the back of the bicycle.

Maganda there and then produced the envelope containing the sum of Shs. 30/- from the pocket of his jacket, pulled out the three notes so that the accused could see them and handed the same over to the accused, who immediately accepted it and instructed Maganda to deliver the matoke at his residence. The accused was then on his way to the court.

The accused, after having received the money, pocketed it in his jacket pocket and continued his journey to the court. Maganda then mounted his bicycle and pretended to be cycling towards the accused's residence, although later he was found at the police post with the matoke on the bicycle. Constable Nsubuga and his constables observed from their hiding place, which was some fifty yards away from the locus in quo, the money in the envelope together with the envelope being handed over to the accused. They also noticed the accused accepting the same and putting it into the right hand side of his jacket pocket. The accused was also seen pointing to the direction of his residence during his conversation with Maganda and soon thereafter Maganda was cycling towards the accused's residence.

The accused continued his journey towards the Magistrate's Court, but as soon as he arrived at the point at which Constable Nsubuga and his two constables were in hiding, Constable Nsubuga coughed a little, that being the agreed signal among the three constables for action. The two constables who were in hiding also with Constable Nsubuga immediately emerged from their hiding place. Constable Nsubuga also came out. He ordered the accused to stop. He introduced himself to the accused as a police officer and told him that he had reason to believe that he had committed the offence of corruption, and that he wanted to search him. The accused then appeared puzzled and slightly confused. Later however he submitted himself to be searched. In the course of the search Constable Nsubuga recovered from the accused's pocket the marked three Shs. 10/- currency notes. They were still in the envelope.

The accused was immediately charged and cautioned. He made a statement and signed it as correct. This statement was taken down in writing by Constable Nsubuga in his pocket diary, exhibit 5. In the statement the accused admitted having received the envelope from Maganda and that he had thought the same contained a statement concerning the latter's case in court. He denied any knowledge that the envelope contained money. He also admitted having requested Maganda to bring to him to buy some quantity of matoke. Hence when he saw the latter with the matoke on that date, September 18, 1967, he had thought he had brought the same to sell to him.

The accused was then formally arrested and taken to the police post, Nakabugo. Maganda was already there and on the arrival of the accused he pointed at him as the man to whom he had delivered the sum of Shs. 30/-, which had been marked by the police, and who had directed him to take the matoke to his own residence. The accused was then taken to Kamuli Police Station. There Inspector Silvano Ocakaon formally charged and cautioned him. The accused volunteered the statement, exhibit 6, which was taken down in writing. He signed it as correct.

In sum the case against the accused therefore was that he, being employed in the public service as magistrate grade III, directly agreed to permit his conduct as such magistrate to be influenced by the gift of Shs. 30/- and two bunches of matoke.

In his defence the accused denied having made any arrangement with Maganda whereby he was to give judgment in Suit No. 11 of 1967 in the latter's favour. He also denied that Maganda had visited his house on September 16, 1967, as alleged. He however admitted having met Maganda on September 10, 1967, and having asked if he could get someone to buy him some matoke as he was a stranger in the area. He said that on September 18, 1967, he was being carried on a bicycle by Erismus Ngoloza to court. When they arrived at the foot of a hill he dismounted from the bicycle as the hill was a high one, and was walking up the hill when he saw Maganda who was then descending the hill and coming towards him on his bicycle. He said that Maganda stopped and alighted from

his bicycle, bowed and shook hands with him. A conversation then ensued between them. Maganda pulled out a letter in an envelope from his pocket and delivered the same to him, at the same time telling him that the letter was given to him for delivery to the accused by a member of the staff at Kiyunga dispensary. The accused admitted having put the envelope into his pocket but denied that he knew the envelope contained money.

Then at a distance of forty yards after the delivery of the letter the accused said he met two policemen in mufti. He had known these two policemen before. They ordered him to stop and informed him that they wanted to search him on the spot. Just at that time, according to the accused, Constable Nsubuga emerged from the bush nearby. He was the only police constable in uniform. Constable Nsubuga thereupon interrogated him. In reply the accused said he told him that he had two letters in his pocket and some case files in his handbag and that he was being carried on the bicycle of Ngolozza to court. At the request of Constable Nsubuga the accused produced the two letters. In one of the letters the envelope of which was bluish in colour the sum of Shs. 30/- was found. The accused was then taken to Nakabugo Police Post and after having been arrested and cautioned he signed the statement, exhibit 6.

Under cross-examination the accused admitted having requested Maganda to get him some matoke, but denied any knowledge that the envelope delivered to him contained money. He also admitted having made and signed the statement, exhibit 5, in Constable Nsubuga's diary, but maintained that at the time he did so he was not cautioned by the police, and that he was only ordered to sign it. The accused further said in his evidence at the trial that Constable Nsubuga bore him a grudge over a barmaid and that that was the real motive behind the trap set for him.

In his judgment the magistrate accepted the case of the prosecution and rejected the defence of the accused. He therefore found him guilty, convicted and sentenced him to a fine of Shs. 400/- and in default six months' imprisonment.

The chief magistrate has complained against the judgment of the learned trial magistrate and has applied for a revisional order to set aside the conviction of and the sentence imposed on the accused.

The first ground of complaint by the learned chief magistrate is that the particulars in the charge were so insufficient that the accused could not possibly be in a position to meet the specific allegation which the prosecution intended to prove, because from the particulars the accused "could not tell if it was going to be alleged that he dropped a charge, frightened a witness, misplaced a file, unduly adjourned a case, or did any of a million other things, manifesting an influenced conduct".

It is difficult to make sense of this particular ground of complaint by the learned chief magistrate. In my view the charge as framed was quite explicit. There was nothing ambiguous about it. It was that the accused agreed to permit his conduct to be influenced by the gift of cash Shs. 30/- and two bunches of matoke. Even if there was any defect in the charge, which is not the case, the evidence produced by the prosecution, as well as by the accused, leaves nobody in doubt that the accused understood both the charge and the case made against him at the trial. As already stated, the case against the accused was that he received Shs. 30/- and also technically two bunches of matoke corruptly with a view to deciding Maganda's case in the latter's favour.

I hold that no miscarriage of justice has been occasioned by the way in which the charge was framed. The particulars were sufficient and ample to give due notice to the accused as to the case he was to meet. Whatever defect there was (and there was none) such defect has been cured by the verdict. The accused

was a magistrate and could not plead ignorance as to the real contents of the charge. He did not complain at his trial that the charge was defective.

The second reason advanced by the chief magistrate was to the effect that what was received by the accused was not what he had demanded from Maganda and therefore no offence had been committed by the accused. This submission is based upon a misconception of the law. Under s. 78 (1) of the Penal Code it is not even necessary that the accused should have received anything at all. The question of the demand made by the accused is completely irrelevant. The gift, promise or prospect must come from the donor or would-be donor. The essence of the offence is the agreement or offer to permit his conduct to be influenced by the gift, promise or prospect of any property or benefit of anything to be received by the accused.

I propose to consider reasons (c) (d) and (e) together as in large measure they relate to the evidence which was before the magistrate. The agreement or offer in the contemplation of s. 78 (1) of the Penal Code is not such as might be required to constitute a contract or to ground the offence of conspiracy but can be a matter of inference. The acceptance of a gift or promise by a public officer for the purpose of showing favour to any person is sufficient to constitute the offence, although there might not have been any particular arrangement between the donor and the recipient. In the present case by accepting or receiving the gift of Shs. 30/- and the implied acceptance of the matoke, which on the evidence he had ordered to be delivered to his residence, well knowing the purpose was to influence his decision in the case in favour of Maganda, sufficiently constitutes the mens rea required to complete the commission of the offence. It must also not be forgotten that in the present case the receiving or acceptance of the money and the matoke was preceded by a demand which emanated from the accused, although the amount subsequently delivered to him was not the amount demanded.

It is incorrect to state, as has been stated by the learned chief magistrate, that the trial magistrate misdirected himself when he said in his judgment "P.2 agreed to do so on September 18, 1967". The statement is not a misdirection. It is supported by the evidence. The passage is a correct quotation of the evidence which the learned trial magistrate was summing-up. The passage appears in the evidence of Maganda in the following terms:

"The accused told me the reason why he asked me to go to his home was because he said my case was not a clear case. Accused said that if I had had something to give him, he would help me in my case. I told the accused that I did not know that it was necessary to give him anything. Accused told me to pay him Shs. 100/-. I told the accused I would take the money to him on September 18, 1967, so that he should help me win the case."

There are however other passages in the judgment which constitute clear misdirections in law, but the passage quoted above is certainly not one of them, and in my view such misdirections as there are have in no way occasioned a miscarriage of justice. For instance, in considering the evidence as to the contents of the envelope the learned trial magistrate said:

"It is evident that all the three notes had been initialled by Livingstone Nsubuga with his initials 'NL' after which they were placed by him in the envelope, exhibit 2. What difference then would it make whether the money was placed in a sealed envelope or an open envelope as long as the money could readily be identifiable by the initials on the money. That is to say it was immaterial for [Constable Nsubuga] whether the money found with the accused was in an untorn envelope or a torn one."

The above passage constitutes a misdirection in law in that if the contents of the envelope were not known to the accused then there would be absence of mens rea on his part because then the accused could not have known that the envelope contained money. It was therefore necessary to establish that the accused was well aware that the envelope contained money. The evidence on this point was very clearly given and it was to the effect that before the envelope was delivered to the accused the three notes were made visible as the envelope was slit open, so that the accused knew when he received the envelope that it contained money.

The passage of the judgment of Goudie, J., in *Uganda v. Jackson Rubakuba* (High Court Criminal Appeal No. 1105 of 1967, unreported) relied upon by the learned chief magistrate, seems to me completely irrelevant to the circumstances of this case, having regard to the evidence which was accepted by the learned trial magistrate. On the evidence the accused knew how he was alleged to have allowed his conduct to be influenced in that the money was given to him because he had promised that if Maganda gave him the sum of Shs. 100/- and two bunches of matoke he would give judgment in his favour; and in order to give a chance to Maganda to find the money and the matoke (incidentally the accused admitted having demanded matoke from Maganda) he adjourned the case, reserved judgment and indicated that he was going to carry out an inspection of the land in dispute. It cannot therefore be said that he did not know that the envelope contained money or that he did not know that the case against him was that by receiving the money he was doing so for the purpose of influencing his decision in the case he was trying.

I am satisfied that the learned trial magistrate gave careful consideration to the whole of the evidence before him. By way of example, the accused in his evidence had alleged that there was a grudge existing between him and Constable Nsubuga. This allegation was dismissed by the trial magistrate in the following words: "I have no doubt that the accused had deliberately lied by having said that Constable Nsubuga bore him a grudge."

The learned trial magistrate concluded his judgment in the following terms:

"I have had the opportunity of hearing and seeing Maganda in the witness box and have no hesitation in accepting his evidence as true and honestly given. I am satisfied that the accused with a view to favouring Maganda in the pending suit permitted his conduct to be influenced whilst employed as a magistrate by the gift of Shs. 30/- and two bunches of matoke which he received."

It cannot be said that there was no evidence to support this conclusion. In my view the magistrate correctly assessed the evidence before him and came to a right conclusion by finding the accused guilty, and convicting and sentencing him.

Before I am done with this revisional order, there is an apparent error on the face of the judgment of the learned trial magistrate as regards the sentence which he imposed upon the accused. He had ordered him to pay a fine of Shs. 400/- or to go to prison for six months in default. The sentence is illegal having regard to the provisions of s. 302, sub-s. (d); (b) of the Criminal Procedure Code Act. The correct sentence should have been Shs. 400/- and in default four months' imprisonment. The sentence is accordingly set aside and the proper sentence substituted therefor, namely, that the accused having been found guilty and convicted, is sentenced to a fine of Shs. 400/- or four months' imprisonment in default.

Subject to this amendment as to sentence, this application is dismissed as without merit.

Order accordingly.

The accused did not appear and was not represented.

For the respondent:

CP Patel (State Attorney, Uganda)

Director of Public Prosecutions, Uganda

Zabasajja v Uganda
[1968] 1 EA 384 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	4 April 1968
Case Number:	688/1967 (72/68)
Before:	Fuad J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Different charges on same facts – Improper use of two different counts to try two separate offences based on evidence of facts of a single transaction.

Editor's Summary

In July, 1967, the appellant was convicted by a magistrate's court of arson and sentenced to five years' imprisonment. The basic facts alleged were that the appellant had set fire to a house wherein a person was burned to death. In September, 1967 the appellant was brought to trial in the High Court on two charges: (i) murder; (ii) arson. Counsel for the State explained that the accused had already been convicted on the same facts by the magistrate's court, and the charge of arson was not proceeded with. The accused was tried on the murder charge and acquitted. All the facts relevant to establish arson were similarly relevant to the charge of murder. The appellant then appealed against his conviction for arson in July.

Held –

- (i) on the evidence the conviction was correct; but
- (ii) where issues of fact are substantially the same, whenever practical the same tribunal should try them and at the same time to avoid the possibility of conflicting judgments (*Connelly v. D.P.P.* (2) adopted).

Appeal against conviction dismissed. Sentence reduced from five to four years.

Cases referred to in judgment:

- (1) *Yowana Sebusukira v. Uganda*, [1965] E.A. 684.
- (2) *Connelly v. D.P.P.*, [1964] 2 All E.R. 401; [1964] A.C. 1254.

Judgment

Fuad J: On July 14, 1967, at Masaka, the appellant was convicted by a magistrate grade I of arson and sentenced to five years' imprisonment. From this conviction and sentence he now appeals to this Court. On the evidence before the trial court, which the magistrate was entitled to accept, it cannot be said that the conviction was wrong. The appeal against conviction is dismissed.

In view of the opening paragraph of the appellant's petition of appeal, I caused enquiries to be made and have discovered the following facts: The appellant appeared before Mead, J., at the September, 1967, Masaka Sessions, on an indictment charging two offences: murder (count 1), and arson (count 2).

This was Criminal Session Case No. 507 of 1967. Counsel for the State conceded that the appellant had already been convicted of arson on the same facts by a magistrate some two months previously, and count 2 was therefore not proceeded with. Ultimately, after a full trial, the appellant was acquitted of murder. I am somewhat surprised that those concerned with the prosecution of the appellant chose to bring him before the district court on a charge of arson, and before the High Court on an indictment for murder, where the homicide was allegedly committed by the appellant setting fire to a house wherein the deceased was burned to death. It is clear that all the evidence to prove the offence of arson was relevant for the murder indictment, and it would surely have been more convenient for both the offences to have been tried by the High Court. Such a course has been permitted, in appropriate cases, since the decision of the Court of Appeal in *Yowana Sebusukira v. Uganda*, [1965] E.A. 684. Apart from the question of convenience, there are more important principles involved. As Lord Devlin put it in *Connelly v. D.P.P.*, [1964] 2 All E.R. at p. 442:

“There is another factor to be considered, and that is the courts’ duty to conduct their proceedings so as to command the respect and confidence of the public. For this purpose it is absolutely necessary that issues of fact that are substantially the same should, whenever practicable, be tried by the same tribunal and at the same time. Human judgment is not infallible. Two judges or two juries may reach different conclusions on the same evidence, and it would not be possible to say that one is nearer than the other to the correct. Apart from human fallibility the differences may be accounted for by differences in the evidence. No system of justice can guarantee that every judgment is right, but it can and should do its best to secure that there are not conflicting judgments in the same matter.”

As regards sentence, the magistrate said that he had to take a serious view since the appellant’s act had caused the death of a person. The death of the occupant of the house was not properly proved and he should not have taken it into account. It is interesting to note that Mead, J., in Criminal Session Case No. 507 of 1967, said this about the evidence of the doctor who had conducted a post mortem examination on the corpse of the woman found in the house:

“... he was unable to give any opinion as to the cause of death. He said it was more likely than not that the deceased had died before the fire started.”

The appellant was a first offender, aged 35 years, but arson is always a serious crime, and I would have made no reduction if the trial magistrate had not erred in principle. In the circumstances I allow the appeal as to sentence to the extent of reducing it from five years’ imprisonment to four years’ imprisonment.

Order accordingly.

The appellant did not appear and was not represented.

For the respondent:

VM Patel (State Attorney, Uganda)

Director of Public Prosecutions, Uganda

Division: High Court of Uganda at Nairobi (Duffus JA)
Date of judgment: 23 February 1968
Case Number: 26/1966 (81 & 82/68)
Before: Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by: LawAfrica

(Reference to a judge and from him to the full Court from a ruling on Taxation by the Deputy Registrar, Mr. Desai.)

[1] *Appeal – Costs – Cross-appeal – Principles to be applied on taxation.*

[2] *Costs – Cross-appeal – Principles to be applied on taxation of costs of successful party on – Eastern African Court of Appeal Rules 1954, r. 6 (2).*

Editor's Summary

Where there is an appeal and a cross-appeal and the costs are awarded to the successful party on the cross-appeal, then all he is entitled to is his additional costs caused to him as a result of the cross-appeal having been filed (*The Stentor* (3) and the *Medway* case (6) adopted).

Cases referred to in judgment:

- (1) *Abdulla v. Shah*, [1959] E.A. 427.
- (2) *Jones v. Stott*, [1910] 1 K.B. 893.
- (3) *The Stentor*, [1934] All E.R. Rep. 545.
- (4) *Greaves v. Nabarro* (1940), 162 L.T. 178.
- (5) *Saner v. Bilton*, (1879) 11 Ch.D. 416.
- (6) *Medway Oil and Storage Co. v. Continental Contractors Ltd.*, [1929] A.C. 88.
- (7) *Wilson v. Walters*, [1926] 1 K.B. 511.

Judgment

Duffus JA: read the following order: This is a reference under the provisions of r. 6 of the Rules of this Court from the taxation by the Deputy Registrar of a bill of costs in a civil appeal. The judgment of this Court provided *inter alia*, (1) that the appeal be dismissed with costs in favour of the second respondent with a certificate for two counsel, (2) that the cross-appeal be dismissed with costs in favour of the appellant with a certificate for two counsel and (3) that there be no order of costs in relation to the first respondent.

The taxation, the subject of this reference, is the appellant's bill of costs on the cross-appeal as against the second respondent. The reference is made at the instance of the second respondent.

The second respondent first complains that the entire bill should have been disallowed, and then in

particular complains against the taxation of some ten individual items in the bill of costs.

The first principle to be observed in the taxation of costs is that the taxation must be in accordance with the order of the court, but there appears to be some doubt as to the principles to be followed on the taxation of the costs of a cross-appeal when a general order has been made by the court, as in this instance, dismissing the appeal with costs to the respondent and dismissing the cross-appeal with costs to the appellant.

Mr. Kapila, who appears for the second respondent, submitted that the main principle to be followed is that the only costs to be allowed on a cross-appeal

are those extra costs occasioned to the appellant by virtue of the cross-appeal. While on the other hand Mr. Winayak, for the appellant, submitted that where the appeal and the cross-appeal raised distinct issues as is the case here, then they should be considered as separate cases for the purposes of taxation. Both advocates in their submissions relied on the authority of English cases although Mr. Winayak referred me to a decision made by a judge of this Court, Forbes, V.-P. on a reference from a taxation of costs in the case of *Abdulla v. Shah*, [1959] E.A. 427. Forbes, V.-P. did not, however, in that case lay down any general principle for the taxation of costs on a cross-appeal, but he did consider the English case of *Jones v. Stott*, [1910] 1 K.B. 893 and express the opinion that where an appeal and cross-appeal are entirely separate and distinct, it would be more convenient to treat the instruction fees separately. The matter does not appear to have been ever fully considered by this court.

The right to file a cross-appeal is given by r. 65 (1) of our Rules. The usual practice of this Court when an appeal comes on for hearing and a cross-appeal has been filed is first to hear the appellant's advocate on the appeal and then the respondent's advocate in reply on the appeal, and then respondent's advocate continues and opens his cross-appeal. The appellant's advocate then addresses finally on the appeal and replies to the submissions made on the cross-appeal. The respondent's advocate then has a final reply on the cross-appeal only. In this respect the court does at the hearing deal with the appeal and cross-appeal separately. The cost of the cross-appeal are of course in the discretion of the court and there are no separate rules of court dealing with the taxation of these costs.

Mr. Kapila referred to a number of English authorities in support of his submission that the only costs allowable to the appellant on his bill of costs on the cross-appeal are those additional costs which have been occasioned to the appellant by reason of the cross-appeal. The matter was fully considered by the Court of Appeal in England in the case of *The Stentor*, [1934] All E.R. Rep. 545 and in *Greaves v. Nabarro* (1940), 162 L.T. 178. I would refer to the following passages from the judgment of Scrutton, L.J., in the *Stentor* case which in my view fully sets out the principles on which the costs of a cross-appeal are taxed in England ([1934] All E.R. Rep. at pp. 547, 548).

"In my view, the decisions that have been given in claim and counterclaim cases, which raises almost exactly the same point, though under different circumstances, ought to be considered as the guide in this matter. The matter arose before Fry, J., in *Saner v. Bilton* (1879), 11 Ch.D. 416 over fifty years ago. At that time there was a considerable doubt, and Fry, J., consulted with all the taxing masters of both Divisions to ascertain what was the practice, and all the taxing masters advised him that when there was no express authority they thought the right principle was on the lines which he stated as follows (11 Ch.D. at p. 47, n.):

"The plaintiff commences litigation, and it seems to me his costs should depend upon his failure or success. The defendant, under the power given by the Act, superadds a claim of his own, and I think the additional costs occasioned thereby should abide the event. I consulted the common law masters, who agreed in this view, but it is only a matter of opinion, there having been no decisions.' . . .

The matter then came up before the House of Lords in 1929, in the *Medway Oil and Storage Co. v. Continental Contractors Ltd.*, [1929] A.C. 88, a case which raises the point very neatly. I will not go into details, but the headnote in the House of Lords is as follows:

"Where a claim and counter-claim are both dismissed with costs, upon the taxation of the costs, the true rule is that the claim should be

treated as if it stood alone and the counter-claim should bear only the amount by which the costs of the proceedings have been increased by it. No costs not incurred by reason of the counter-claim can be costs of the counter-claim.'

. . . It is a decision on this principle – the plaintiff appeals, treat that as a separate matter; if he fails, he is bound to pay all the costs occasioned by the defendant resisting his appeal. If there has been a cross-appeal, the matter is not to be dealt with by apportionment between the two, but only those extra costs which are occasioned by the cross-appeal are the subject matter of the order for costs on the cross-appeal.”

The matter was succinctly stated in the judgment of Lord Carson in *Medway Oil and Storage Co. v. Continental Contractors Ltd.* (*supra*) when he accepted the statement made by Mackinnon, J., in his order in the High Court when he said:

“ ‘I think the proper principle to apply is that which is stated in *Wilson v. Walters*, [1926] 1 K.B. 511, namely, that where a matter arises both on the claim and the counter-claim the plaintiffs are only entitled to such extra costs as were occasioned by the counter-claim.’ ”

Mr. Winayak largely relied on the decision of Forbes, V.-P. in the *Abdulla v. Shah* case to which I have already referred. The decision in the English case of *Jones v. Stott* to which Mr. Winayak also relied was fully considered by the Court of Appeal in England in *Greaves v. Nabarro* (*supra*) and as Mackinnon, L.J., pointed out in his judgment, the issue in *Jones v. Stott* was not on some item in the bill necessary to the appeal and not therefore to be shared by the cross-appeal but was rather the apportionment of the fees of counsel who appeared at the joint hearing and which were necessarily higher by virtue of the cross-appeal.

I am of the view that the principles of which the taxation of this bill of costs on the cross-appeal have been correctly set out in the passages which I have quoted at length from the judgment of Scrutton, L.J., in the *Stentor* case (*supra*). The appeal was brought by the appellant and he has failed in his appeal and court ordered that the second respondent should have the costs of this appeal, these costs would not include any costs occasioned or increased by the cross-appeal, but to allow the appellant to include in his bill of costs on the cross-appeal items common to both appeal and cross-appeal would have the effect of depriving the respondent of these costs. The test is not whether some item is common to both appeal and cross-appeal, but whether the charges on any particular item have been increased by reason of the cross-appeal. If the charges have been so increased, as in the case of instruction or hearing fees for an advocate, then it is the duty of the taxing master to allow such amount as may appear to him to be necessary and proper in the circumstances, and in this respect, he may have to apportion the fee paid on the brief, in the sense that he has to divide the fee paid between the appeal and the cross-appeal allowing what he considers to be the proper remuneration for the appeal and then for the cross-appeal. If the item is common to both appeal and cross-appeal and there has been no increase in the amount of the charge, then such item should not be allowed on the taxation of the costs of the cross-appeal.

I will now proceed to consider the second respondent's objections to the taxation.

Objection 1. This is an objection to the entire bill of costs. I do not understand this objection. It is clearly not maintainable and Mr. Kapila for the second respondent quite correctly concedes this.

Objection 2. This is an objection to item 2 on the bill of cost “instructions to act for the appellant/respondent in the cross-appeal Shs. 40/-”. I am of the view that this amount was correctly allowed. The advocate had to be instructed to act for the respondent in the cross-appeal and this would, in my view, be included within the meaning of item 2 in the Scale A of the 3rd Schedule to our Rules. “2. Instructions to act for a respondent.”

I will deal with objection number 3 together with the objection number 9 later.

Objections 4 and 5 are in respect of item 5 “attendance before the Registrar fixing dates 15/-” and item 7, “attending court to hear judgment 40/-”. These items are common to both appeal and cross-appeal and no extra costs are incurred on account of the cross-appeal. The advocates had in any event to appear before the Registrar to fix the hearing date and before the court to take the judgment on the appeal. On the principles which I have set out these amounts should not have been allowed.

Objections 6, 7 and 8. These objections are to item 8 “Drawing order 60/-”. Item 9 “Making a copy thereof for approval by the first and second respondents 4/20”. Item 16 “Paid for certified copy of judgment 100/50”.

I agree with the objection to these three items. These items were common to the appeal and cross-appeal. I cannot see that there had been any real increase in the amount of work to be done by virtue of the cross-appeal. There is no separate order for the cross-appeal, and the only apparent increase would be the addition of the few words to the order stating that the cross-appeal had been dismissed with costs to the appellant. I maintain the objections to these three items.

Objection 10 was withdrawn before me. Objection 11/item 17 – it appears from the ruling of the Deputy Registrar that this item was taxed by consent, this being so, it is, in my view, not competent for the second respondent now to seek to object to this taxation. This objection is refused.

Objections 3 and 9. Both these objections concern the amounts allowed for instruction fees and for the brief fee paid on the cross-appeal. The following short extract from the judgment of Goddard, L.J., in the case of *Greaves v. Nabarro (supra)*, referred to by the Registrar in his taxation of the costs of the appeal, in my view, correctly set out the principles to be followed by taxing masters in such cases:

“I express no opinion whether or not counsel is entitled to two briefs in an appeal and cross-appeal where, as in my experience often happens, only one brief is delivered. Whether one brief is delivered at an increased fee or two briefs at marked fees, the question the Taxing Master has to ask himself is, what is the proper remuneration to be allowed counsel? He can put it on two briefs if he likes or put it on one brief and divide it up. In this case the Taxing Master has said that 20 guineas would be allowed in respect of the brief on the appeal and 20 guineas in respect of the cross-appeal. This is a question of quantum as to which, as my Lord has said, it is not open to the Judge in Chambers to overrule the decision of the Taxing Master.”

In this case the Deputy Registrar, Mr. Desai, has carefully considered the amount of work entailed both in the appeal and in the cross-appeal and has in my view, also correctly taken into account the amounts allowed by the Registrar in the taxation on the bill of costs on the appeal, and has then arrived at his decision as to the amounts to be allowed on these two items. He appears to have correctly directed himself on the law and principles to be applied and I would not interfere with his decision as to the quantum on either of these two items.

In conclusion I would therefore dismiss the objections to the taxation of the bill of costs as a whole and also to the taxation of items 2, 3, 15 and 17 and I would allow the objection to items 5, 7, 8, 9 and 16 and order that taxation on these items be quashed.

There remains the question of the costs of this review. The second respondent was justified in bringing this matter on review in that he has succeeded on five of his objections but he was certainly not justified on his objection to the whole bill of costs and he has failed in another five of his objections which include the major items relating to the instruction and brief fees. In all the circumstances I make no order as to the costs of this review.

Order accordingly.

The matter was then further referred to the full Court.

March 22, 1968. The following ex tempore judgments were delivered:

Sir Charles Newbold P: This is a reference to the full Court from a decision of a single judge of the Court, Duffus, J.A., given on a reference to him from the decision of the Deputy Registrar acting as a taxing master and taxing the bill of costs on a cross-appeal.

As the matter stands before us, and as it stood before Duffus, J.A., the only matter which can be considered having regard to r. 6 (2) of the Rules of this Court, is a matter of principle as neither the single judge nor this Court has jurisdiction to entertain references in relation to quantum. The matter of principle on which we are asked to give a decision arises somewhat unusually, because Mr. Kapila, who appears for the applicant, accepts the statement of principle set out in the decision of Duffus, J.A. That statement of principle is that where there is an appeal and a cross-appeal and the costs are awarded to the successful party on the cross-appeal, then all he is entitled to is his additional costs caused to him as a result of the cross-appeal having been filed. Duffus, J.A., gave his reasons for arriving at that decision of principle. I can do nothing more than say that I agree with him for the reasons which he has given.

Mr. Kapila has not challenged the principle before us. He has admitted, however, that the Deputy Registrar did not, in arriving at the amount which he allowed on two items, one of which was the instructions fee, have regard to that principle of law. Mr. Kapila was unable to point out anything in the decision of the Deputy Registrar which showed that he had approached his decision from a wrong principle and had arrived at quantum by applying a wrong principle of law. But Mr. Kapila urged that the amount allowed, that is Shs. 2,100/- was so excessive in the circumstances of the case as to lead to the inference that the Deputy Registrar must have applied a wrong principle of law and could not correctly have directed himself on the proper principle. The only reason Mr. Kapila gives for saying that this figure of Shs. 2,100/- was so grossly excessive as to lead to that inference is because the Registrar, (Mr. Gaffa) who at an earlier stage (see [1967] E.A. 604) had taxed the bill of costs on the appeal, had taxed off a sum of Shs. 1,080/- from the instructions item, and because there were some words in his decision which seemed to suggest that that amount had been taxed off as being the proportion of the total instruction fee received by the advocate which must be related to the cross-appeal as opposed to the appeal. Even if this was so, and in my view it is not so, the fact that the Registrar considered Shs. 1,080/- as being a proper fee for the instructions to act on the cross-appeal does not mean that because the Deputy Registrar considered the proper fee to be Shs. 2,100/- therefore the Shs. 2,100/- is so excessive as to lead to the inference that the Deputy Registrar misdirected himself in law. As I have said, however, I do not think

that the Registrar when he taxed off Shs. 1,080/- was deciding that that was the proper figure for instructions on the cross-appeal. He had before him a figure in excess of Shs. 5,000/- and he had been informed that that figure was inclusive of both the appeal and the cross-appeal. It was also, incidentally, inclusive of another aspect of the matter which the Registrar dealt with in his judgment; that is the cost of passages. The Registrar considered various matters and came to the conclusion that the proper fee on the appeal was Shs. 5,000/-. As a result he taxed off various amounts from the instructions fee in the bill of costs in so far as these amounts exceeded what he considered to be the proper fee, that is Shs. 5,000/-. One of the amounts he taxed off from the instructions fee was the cost of passages. After doing so the instructions fee was still Shs. 6,080/- so to arrive at Shs. 5,000/- he taxed off the residue. This residue amounted to Shs. 1,080/-. I do not understand the Registrar in taxing off that amount to have come to the conclusion that that was the proper instructions fee to be allocated to the cross-appeal, though admittedly there are some words which he used which could give rise to that construction. What, however, he was considering was the proper fee on the appeal. He arrived at the conclusion that it was Shs. 5,000/- and taxed off the balance in the appeal bill of costs. As I have said, there is nothing in that which leads me to the conclusion that the sum of Shs. 2,100/- allowed by the Deputy Registrar was so grossly excessive as to lead to the conclusion that he must have misdirected himself on the law. Mr. Kapila has not satisfied me that the Deputy Registrar applied any wrong principle of law, nor did he so satisfy Duffus, J.A., on the reference to him. On this aspect of the case, therefore, I see no reason whatsoever to interfere with the decision of Duffus, J.A., or with that of the Deputy Registrar.

There is one further trivial matter left. Mr. Kapila has objected to the allowance by the Deputy Registrar and in turn by Duffus, J.A., of a sum of Shs. 40/- on item 2. Mr. Kapila submits that as a matter of law, item 2. scale A, which allows for a figure of Shs. 40/- for instructions to act for a respondent does not apply where the respondent is the respondent on a cross-appeal. In this case the appellant was the respondent on the cross-appeal and I think, as a matter of law, the amount was properly allowed.

For these reasons I would dismiss this reference.

Sir Clement De Lestang V-P: I agree and cannot usefully add anything as anything I might say would be mere repetition of what my lord President has said. I, too, would dismiss this reference.

Law JA: I also agree.

Reference dismissed with costs.

For the appellant:

DV Kapila

Khanna & Co, Nairobi

For the respondent:

JK Winayak

JK Winayak, Nairobi

Division: Court of Appeal at Mombasa
Date of judgment: 23 May 1968
Case Number: 10/1968 (89/68)
Before: Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by: LawAfrica
Appeal from: High Court of Kenya – Wicks, J

[1] Civil Practice and Procedure – Dismissal for want of prosecution – By Court of own motion when no step taken for three years – Whether Court has jurisdiction to set aside such dismissal and restore suit – Civil Procedure (Revised) Rules 1948, O. 16, r. 6; Civil Procedure Act, ss. 81 and 97 (K.).

[2] Civil Practice and Procedure – Inherent jurisdiction – Exclusion of – Whether excluded by express rule – Civil Procedure (Revised) Rules 1948, O. 16, r. 6; Civil Procedure Act, ss. 81 and 97 (K.).

Editor’s Summary

The appellant sued the respondent in 1962. No step was taken in the suit for over three years; and the Court of its own motion and without notice to the parties dismissed the suit under O. 16, r. 6 of the Civil Procedure (Revised) Rules 1948. The appellant then applied to have this order of dismissal set aside and the suit restored, under s. 97 of the Civil Procedure Act. The Court dismissed this application, holding that its inherent jurisdiction under s. 97 was excluded by O. 16, r. 6. The appellant appealed.

Held – in the special circumstances of this case the remedy provided for in O. 16, r. 6 (that is, of bringing a fresh suit) was not intended to be exhaustive and the inherent jurisdiction vested in the Court by s. 97 of the Civil Procedure Act was for that reason not excluded.

Observations on the exclusion of the inherent jurisdiction by rules providing an express remedy.

Appeal allowed with costs. Case remitted to High Court.

Case referred to:

(1) *Kanti & Co. v. British Traders Insurance Co., Ltd.*, High Court Civil Case No. 314 of 1962 (unreported).

The following ex tempore judgments were delivered:

Judgment

Law JA: This appeal arises out of a suit filed in Mombasa on April 10, 1962, in the High Court, in which the plaintiff claimed Shs. 9,000/- allegedly due to him in respect of unpaid salary, and a defence was filed on May 16, 1962, denying liability to pay that sum or any other sum. As is not unknown in Mombasa, there was then an interval during which nothing happened. In fact, no action whatsoever was taken in the suit for well over three years. By O. 16, r. 6, in any case not otherwise provided for, in which no application is made or step taken for a period of three years by either party with a view to proceeding

with the suit, the court may order the suit to be dismissed. In such a case the plaintiff may, subject to the law of limitation, bring a fresh suit.

On February 26, 1966, the High Court, of its own motion and without notice to the parties, dismissed the suit. Although no step had been taken in the suit during that period the appellant's advocate had, on one occasion, tried to get it set down for hearing by consent with the other side but no application was made to the court. The plaintiff applied to the High Court for the order of

dismissal to be set aside and the suit restored. This application was made under s. 97 of the Civil Procedure Act and was heard by Wicks, J., who delivered his ruling on January 29, 1967. He held that the court had no jurisdiction to restore the suit, the reason being that in his opinion O. 16, r. 6, provided its own remedy; that is to say, the bringing of a fresh suit subject to the law of limitation; and that in the circumstances the exercise of the High Court's inherent powers conferred by s. 97 of the Civil Procedure Act was excluded. Against that decision of the High Court the plaintiff now appeals, the main ground being that the learned judge erred in law in holding that he had no jurisdiction to restore the suit. Mr. Doshi, who appeared for the appellant, relies in great measure on an unreported decision of the High Court in *Kanti & Co. v. British Traders Insurance Co., Ltd.* (Civil Case 314 of 1962) in which a very similar position was considered by Rudd, J. A suit, or several suits, had been dismissed under O. 16, r. 6, without notice to the parties, who then applied for the suits to be restored; and the learned judge decided that although O. 16, r. 6 provided a remedy he was nevertheless satisfied that there remained an inherent power to set aside the dismissals if the requirements of justice so demanded the exercise of that power, as for instance if limitation rendered the prescribed remedy futile.

Mr. Inamdar, with his usual clarity of expression and persuasiveness, has cited various Indian cases in support of his proposition that where in a rule the procedure to be adopted for a remedy is provided for, the invocation of inherent power to provide an alternative remedy is excluded, except in relation to the procedure laid down in the rule; in other words, the court has no jurisdiction to use its inherent powers to override the express provisions of the law.

I have no reason to doubt that those cases were correctly decided in relation to the provisions of the Indian Code and Rules with which they were concerned. But the provision with which we are concerned, i.e., O. 16, r. 6, is a very special provision which finds no counterpart in India. Mr. Inamdar has referred us to other instances, for instance, under O. 9, in which the remedies open to a party whose suit has been dismissed are laid down. In all those cases the party affected had notice of what was done, in the case now under consideration he had no such notice and that is why O. 16, r. 6, stands in a very special position.

Mr. Inamdar's second submission is that even if the court has a residue of discretion in this case, the court will not exercise its discretion where the effect is to deprive a part of a defence such as the protection of limitation and in that respect again I think that the cases relied on by Mr. Inamdar were not altogether in point having regard to the peculiar position here. The defendant, if the case is restored, is not being deprived of any defence that he originally enjoyed or that he originally pleaded; he is being deprived of what one might call an after-acquired defence which has accrued to him solely through action taken by the court of its own motion of which he was not even aware. I personally consider that in the special circumstances of this case the remedy provided for in r. 6, that is of bringing a fresh suit, was not intended to be exhaustive and that the inherent jurisdiction vested in the court by s. 97 of the Civil Procedure Act is for that reason not excluded.

I would allow this appeal and order that the application for the re-institution of the suit be returned to a judge of the High Court for consideration as to whether, in the exercise or the Court's inherent jurisdiction and of his general discretion a case has been made out so as to justify the re-institution of this particular suit and the setting aside of the order for its dismissal.

Sir Clement De Lestang V-P: I agree and have nothing to add.

Sir Charles Newbold P: I also agree; and I would like to state that I agree with every word that Law,

J.A. has said. It may be gilding the lily a bit, but I would like to say one or two more words.

The trial judge held that he had no jurisdiction to hear this matter. Mr. Inamdar has submitted the judge was right because r. 6 of O. 16, has provided the remedy for the situation with which it deals and that in those circumstances the court should not invoke its inherent jurisdiction so as to provide an alternative remedy. In support of that he has referred to a number of Indian cases. Now I think that any rule which purports to take away the inherent jurisdiction of the courts should be looked at very carefully before it is construed in such a manner. I do not seek to base my decision solely on this, but I should like to refer to the provisions of ss. 81 and 97 of the Civil Procedure Act. Section 97 reads:

“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the needs of justice or to prevent abuse of the process of the court.”

It is, I think, important to consider carefully the obvious intention that nothing in the Act should prevent a court from exercising its inherent powers in such manner as would be necessary to prevent injustice. What it is sought to do in this case is to say that a provision in the Rules precluded the courts from taking action which may result in preventing injustice; and it is sought to say that this position arises by reason of Rules made under the same Act in which s. 97 appears. Section 81, which is the section giving power to make the Rules, says that these Rules shall not be inconsistent with the provisions of the Act. Surely, if one were satisfied that the effect of Rules construed in a particular way would be to result in injustice, then the provisions of s. 97 and s. 81 clearly show that the Rules should not be construed in such a manner.

Here a suit was dismissed by an informal order of the court made without notice to the parties. We have heard in outline the position which gave rise to the suit and the delay in its prosecution. I think all that need be said at this stage is that it is part of a family quarrel in which the members of a family have shown one to the other that customary amount of love and affection which one expects when there is a dispute within a family. Be that as it may, what we are concerned with construing is whether O. 16, r. 6, has taken away the jurisdiction of the court in regard to the control of its own order when to do so may result in injustice. I do not wish to be understood to be saying that it would result in injustice in this case, but the argument applies in every case as it goes to a question of jurisdiction. I do not think that r. 6 should be so construed. I would agree entirely with the very clear and able judgment of Rudd, J. to which my brother Law has already referred as showing that this rule shall be construed in a way which would not take away the jurisdiction of the court to remedy an injustice should it be satisfied that such an injustice exists. Rudd, J. emphasised that the rule related to an informal order of the court itself. We all know that a court has control over its order until it is perfected. Even if the order is made in the presence of the parties and after argument, it is still open to a court, before it is perfected, to recall the order. Yet here it is urged that r. 6 is to be construed in such a way as to prevent the court from exercising control over its own order made, not only without argument, but, indeed, without even the knowledge of the parties and informally. I cannot accept such a construction.

Turning to the second point urged by Mr. Inamdar, he has urged that, in fact, Wicks, J. exercised his discretion. I regret I cannot accept that. It is true that in the course of his judgment Wicks, J. did say that a court should not take action which would result in defeating the protection of the law of limitation. I consider, however, that those words were spoken in relation to the consideration of the interpretation of the rule and not to whether, in the circumstances of the case, he should exercise discretion. On this matter I should like to agree

entirely with what Law, J.A. has said. This is not a case of taking away a benefit which the defendant had of the protection of the law of limitation. The defendant had no such protection, no such right, at the time that he filed his defence. As my brother has pointed out, this right has come into existence by the action of the court itself.

I think we are all concerned about whether it would not be proper, in order to avoid further costs, to take on the duty of exercising the discretion which the trial judge should have exercised. Nevertheless, both of my brethren, and I also have come to the conclusion that this is a case in which a judge of first instance should himself exercise the discretion of the court. I agree, therefore, with the order proposed by Law, J.A. Accordingly the appeal is allowed and the matter remitted to a judge of the High Court to consider the application on its merits on the basis that he has jurisdiction so to do.

Appeal allowed with costs. Ruling and order of the court below set aside and the matter remitted to a judge of the High Court. Costs of the court below, both for the original hearing and the subsequent hearing, to be in the discretion of the judge to whom the matter was referred.

For the appellant:

DD Doshi and SN Mehta
Doshi & Chohan, Mombasa

For the respondent:

IT Inamdar
Bryson, Inamdar & Bowyer, Mombasa

Gakubu v Republic **[1968] 1 EA 395 (HCK)**

Division:	High Court of Kenya at Nairobi
Date of judgment:	31 May 1968
Case Number:	316/1968 (92/68)
Before:	Farrell Ag. CJ and Miller J
Sourced by:	LawAfrica

[1] *Criminal Law – Theft by servant – Bus conductor taking Shs. 1/40 for Shs. 1/50 fare and giving receipt for Shs. 1/30 – Whether amounts to theft by servant of Cts. -/10 – Whether received “on account of” or “on behalf of” employer – Penal Code, ss. 268, 272 and 281 (K.).*

[2] *Criminal Law – Theft – Property – Fare received by conductor “on behalf of” employer is property of employer – Penal Code, s. 272 (K.).*

Editor's Summary

The appellant, a bus conductor, took Sh. 1/50, which was the correct fare, from a passenger; but he gave the passenger Cts. -/10 change and a ticket for Sh. 1/30. He was charged with, and convicted of, stealing by a servant the sum of Cts. -/10. On appeal:

Held – the accused received the Sh. 1/40 “on behalf of” his employer in terms of s. 272 of the Penal Code, so that the whole amount became the property of his employer; and in taking Cts. -/10 of it he was guilty of theft by a servant.

Appeal dismissed.

Case referred to:

(1) *R. v. King* (1871), 12 Cox C.C. 73.

Judgment

Farrell Ag CJ: read the following judgment of the Court: The appellant, a bus conductor employed by Kenya Bus Services Ltd., was charged with the offence of stealing by a servant contrary to s. 281 of the Penal Code, the particulars alleged being that he stole from his employer the sum of 10 cents. He was convicted and sentenced to eight months' imprisonment. He appeals against his conviction and sentence.

The following summary of the prosecution case is taken from the judgment:

"The prosecution evidence of this charge of theft by accused contrary to s. 281 of Penal Code, a servant of Kenya Bus Services Ltd., of Cts. -/10, from the said K.B.S. Ltd., is that on September 18, 1967, at about 3.15 p.m., P.W.1 and P.W.3 both employed by East African Investigation Bureau on duties of checking crimes committed by bus conductors in buses, entered at Kabete for Kariobangi a Kenya Bus in which the accused an employee of complainant company, was the conductor. This they did in accordance with the schedule of 'bus routes' for that day they had been given to cover in the course of their employment. Both asked the accused for tickets to Kariobangi and whereas P.W.3 was given two tickets for Sh. 1/50 the correct fare for one person (exhibit 2), P.W.1 who, also after being told the correct fare was, however, told by the accused to wait when he attempted to pay the accused Sh. 1/50. The accused then proceeded to collect fares from other passengers. When the bus reached Dagoretti Corner a bus inspector was seen making for the bus coming from the opposite direction. The accused came to P.W.1, asked for the fare, took Sh. 1/50, gave two tickets for Sh. 1/30 (exhibit 1) with one 10 ct. piece to P.W.1, and asked him to tell the inspector, if asked, that he had boarded the bus there. The inspector checked the tickets of the passengers including P.W.1's."

The learned magistrate then remarked:

"If that is what the accused did then there can be no doubt whatsoever that he had stolen Cts. -/10 belonging to his employers."

After considering the evidence and the denial of the appellant that the alleged incident took place, the learned magistrate stated his conclusion thus:

"I accept P.W.1's evidence. I am satisfied beyond reasonable doubt that on that occasion the accused accepted from P.W.1 Sh. 1/40 for a trip, the correct fare for which was Sh. 1/50, and issued a ticket for Sh. 1/30. He thereby credited the complainant company with the receipt of a sum of Sh. 1/30, and not Sh. 1/40. I am satisfied beyond reasonable doubt that the accused, a servant of the complainant company, stole the balance Cts. -/10."

In his petition of appeal, the appellant repeats his denial of the charge, comments on the failure of P.W.1 to report the offence to the inspector, and repeats an allegation made in court that he had not been informed of the case against him until he was brought to court more than four months after the date of the alleged offence. The last two points were considered by the learned magistrate who accepted the explanation of P.W.1 as to the first, and was satisfied that when the appellant was suspended two days later he knew the nature of the offence with which he was going to be charged. We find that there is no substance in these complaints and we are satisfied that there was ample evidence on which the magistrate could have found the facts proved as outlined above.

We do not, however, find it immediately self-evident from the facts proved that in law the offence alleged was committed, nor have we been given any assistance on this point either in the judgment or in the submissions of State counsel. For the determination of this question it is necessary to look with some care at the relevant provisions of law.

While the charge against the accused was specified as stealing by a servant contrary to s. 281 of the Penal Code, and follows the precedent set out in the Second Schedule of the Criminal Procedure Code, the section itself like others in its vicinity is strictly no more than a penal section. The offence which has to be proved is theft as defined in s. 268, and the section provides that when the offender is a clerk or servant, and the thing stolen is the property of his employer, or came into his possession on account of his employer, the offence is punishable more heavily than the simple case of theft. In this case there is no dispute that the appellant was a servant of the company; and the conviction under this section presupposes that when the appellant “took” the money, it was the property of his employer, or came into his possession on account of his employer.

As in all questions of theft, we have to avoid being misled by the provisions of the English law which in many respects are similar, but in other respects are materially different from the law in this country. Under English law the case would have been charged as embezzlement under s. 17 of the Larceny Act 1916, which is set out in Archbold (36th Edn.), para. 1701. It is interesting to find in para. 1727 a short summary of a case decided nearly a century ago in England, where a tram conductor had been found guilty of defrauding his employer in a way not unlike that alleged in this case: see *R. v. King* (1871), 12 Cox, C.C. 73. The issue in that case, however, was whether it had been proved that the conductor had received the sum of money alleged by the prosecution. Here we are satisfied that the amount alleged was received, and the question is whether at that instant it became the property of the employer. The section, as we have seen, appears to distinguish between what is the property of the employer and what came into the possession of the offender on account of his employer. This distinction seems to have its origin in the English section. But in the light of s. 272 of the Penal Code it appears to us that the distinction is one without a difference. Section 272 deals with “money received for another” and reads:

“272. When a person receives, either alone or jointly with another person, any money on behalf of another, the money is deemed to be the property of the person on whose behalf it is received, unless the money is received on the terms that it shall form an item in a debtor and creditor account, and that the relation of debtor and creditor only shall exist between the parties in respect of it.”

There is no question here of a debtor and creditor account, and it seems to us clear that if the appellant received the 10 cents the subject of the charge “on behalf of” his employer, it was by virtue of s. 272 the property of his employer, and there is no need to consider whether it was also received “on account of” his employer (if, indeed, there is any difference between receipt “on behalf of” and “on account of” a person).

When P.W.1 for the second time tendered Sh. 1/50 to the appellant, he was offering him the amount of the full fare for his journey, and on the facts found both he and the appellant were aware that he had boarded the bus at Kabete and that the correct fare was Sh. 1/50. In failing to issue a ticket for Sh. 1/50 the appellant was no doubt in breach of his duty to the company; but that is not the offence with which he is charged. What in fact he did, so it seems to us, was to accept from P.W.1 as a payment for his fare the sum of Sh. 1/40. In issuing a ticket for Sh. 1/30 the appellant may well have been guilty of another offence, the offence of fraudulent false accounting under s. 330; but again

that is not the offence with which he is charged. What is relevant is that he received the sum of Sh. 1/40 in payment of a fare and he received it “on behalf of” his employer in terms of s. 272, so that the whole amount became the property of his employer. He duly accounted for Sh. 1/30 at the end of the day, but he undoubtedly “took” 10 cents the property of the employer, and so is guilty of the offence charged under s. 281.

For these reasons we are satisfied that the conviction was a proper one on the facts found, and we confirm it. The sentence at first sight appears heavy in view of the insignificant amount of the money the subject of the charge. But in view of the considerations urged by the officer who gave evidence on behalf of the company, it is clear that malpractices of this nature are widespread and that the only way to check them is by imposing a deterrent sentence upon any offender who is brought to court and convicted. In the light of the circumstances we do not consider that the sentence was in any way excessive or unreasonable and we decline to interfere with it.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:

JB Karugu (State Counsel, Kenya)

Attorney-General, Kenya

Beecham Group Ltd v International Products Ltd and another [1968] 1 EA 398 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	22 February 1968
Case Number:	1152/1967 (80/68)
Before:	Rudd J
Sourced by:	LawAfrica

[1] Patents – Release from patent – Patented article sold outside Kenya by licence – Royalty paid – Purchaser imports article into Kenya and sells it – Licence not extended to Kenya – Whether Kenya patent infringed.

[2] Patents – Sale by Licensee – Whether sale by licensee releases patented article from patent – Article patented in Kenya and elsewhere sold under licence elsewhere and then imported into and sold in Kenya – Licence not extended to Kenya – Whether infringement of Kenya patent.

Editor’s Summary

This was an application for a temporary injunction pending disposal of an infringement suit, brought by the plaintiff, Beecham. Beecham had discovered a new penicillin drug called ampicillin; and had patented it in many countries including the United States, Panama and Kenya. Beecham had licenced the second defendant, Bristol, to manufacture, use, and sell ampicillin, in return for payment of royalty, in a large number of countries; but not in Kenya. This licence was contained in a long and comprehensive agreement, one clause of which expressly confirmed that no further matters were to be implied into it. Bristol manufactured another penicillin drug called hetacillin and sold some to the first defendant, International, in Panama. International imported this hetacillin into Kenya and sold it there. Beecham alleged that hetacillin was substantially the same as ampicillin and was covered by its ampicillin patents; and that thus the sale of hetacillin in Kenya by International was a breach of the Kenya patent rights and should be restrained. International did not argue

at the hearing of this application that hetacillin was not covered by Beecham's ampicillin patent; but argued that since the sale to it of the hetacillin was made in a place covered by the licence given by Beecham to Bristol it obtained a good title to the drug free from all Beecham's patents in any part of the world including Kenya, because the sale had been authorised by Beecham under the licence and the royalty had been paid thereon.

Held –

- (i) payment of a royalty may free a patented article from the monopoly of a patent where the monopoly is the monopoly in respect of which the royalty has already been exacted (*Adams v. Burke* (3) considered);
- (ii) where the patentee has himself sold the patented article it is freed from all his patents if there was no specific reservation, because the purchaser gets all the vendor's rights in respect of the article (*Holiday v. Matheson* (7) considered);
- (iii) if the patented article is sold by the patentee's agent within the scope of his authority then the purchaser has all the rights of the patentee in the same way as if it had been sold direct by the patentee;
- (iv) if the patented article is sold by a licensee the extent to which the article is released from the patentee's patent rights must depend upon the extent of the authority conferred on the vendor by the licence;
- (v) patented articles can be sold by a licensee in one country free from the monopoly of the patent in another country if the licence is wide enough to give the licensee authority to effect such a transaction (*Curtiss Aeroplane and Motor Corporation v. United Aircraft Engineering Corporation* (6) and *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Co. Ltd.* (1) considered);
- (vi) but where a patented article is sold by one who is authorised to sell it and who has paid a royalty to the patentee in respect of that sale in one country the article is not necessarily freed from the licensor's monopoly under unlicensed patents in other countries;
- (vii) in this case the United States or Panamanian patents were not the same patents as the patents registered in Kenya, and a release from the United States of Panamanian patents did not necessarily imply a release from the Kenya patents; that depended on the contract;
- (viii) in order to obtain freedom from the Kenya patent there must be a sale with the authority of patentee in Kenya; and that authority must amount to an authority to discharge the patented article from the operation of the Kenya patent;
- (ix) in this case the patentee was not the vendor, nor privy to the sale by the licensee and never released or authorised (expressly or impliedly) the release of the licensed articles from the monopoly of the Kenya patent.

Temporary injunction granted.

Cases referred to in judgment:

- (1) *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Co. Ltd.* (1883), 25

Ch.D. 1.

(2) *Betts v. Willmot* (1871), L.R. 6 Ch. App. Cas. 239.

(3) *Adams v. Burke* (1873), 17 Wall (84 U.S.) 543.

(4) *Keeler v. Standard Folding Bed Company* (1895), 157 U.S. 659.

(5) *Boesch v. Graff* (1890), 133 U.S. 697.

(6) *Curtiss Aeroplane and Motor Corporation v. United Aircraft Engineering Corporation* (1920), 266 Fed. 70 (2nd Cir.).

(7) *Holiday v. Matheson* (1885), 24 Fed. 185.

Judgment

Rudd J: This is an application for a temporary injunction against the first defendant pending the disposal of the suit. The plaintiff is Beecham Group Ltd. and will be called in this ruling “Beecham” for short. The first defendant is International Products Ltd. and will be called “International” for short in this ruling. The second defendant is Bristol-Myers Co. and will be called “Bristol” for short in this ruling.

Beecham discovered how to produce a new penicillin drug called ampicillin and patented it all over the world. Preparations of this drug are marketed by Beecham under the trade name of “Penbritin”.

Beecham licensed Bristol to manufacture, use and sell ampicillin in a large number of countries where Beecham held patent rights, but there was no licence granted to Bristol in respect of Beecham’s patent rights in Kenya and most or all of the other countries of the Commonwealth.

Bristol discovered how to make a new substance by combining or processing ampicillin with one other substance, thereby producing hetacillin, which has the same therapeutic effects as ampicillin. Hetacillin is made from ampicillin and is converted back into ampicillin in the patient’s body. Its therapeutic effect is derived from the ampicillin into which it is converted in the patient’s body. Hetacillin is sold by Bristol under the trade name of “Versapen”.

As far as this application is concerned, International, though not admitting that hetacillin infringes Beecham’s patent in Kenya, has not argued the point, and on the affidavits I hold that hetacillin or “Versapen” is within the scope of the protection of the Beecham’s patent.

Bristol manufactured hetacillin and sold some of it to International. This sale took place in a country in which Bristol was licensed to sell ampicillin under its licence from Beecham, and after the sale to International the hetacillin was imported into Kenya and some of it was sold in Kenya by International.

There were two main licensing agreements between Bristol and Beecham. One was made in New York and is to be construed in accordance with the law of New York, and the other was made in Panama and is to be construed according to the law of England. Although there are some differences of form of minor nature and substance in these two agreements, as far as this case is concerned such differences as exist are not material and can be discounted. In both contracts a royalty was to be paid to Beecham on the basis of a percentage of nett sale value. Only one payment of royalty was to be paid in respect of each unit sold in respect of the Beecham patents which were licensed. The agreements were obviously carefully drawn and were contained in eleven foolscap pages of typescript in one case and fifteen such pages in the other case, as well as several further pages of schedules. Each of these agreements contained a clause in these terms:

“ENTIRE AGREEMENT AND AMENDMENTS

This agreement contains the entire understanding of the parties with respect to the matter herein contained. There are no restrictions, promises, covenants or undertakings other than those expressly set forth herein, and no rights or duties on the part of either party hereto are to be implied or inferred beyond those expressly herein provided for. The parties hereto may, from time to time during the continuance of this agreement, modify, vary or alter any of the provisions of this agreement but only by an instrument duly executed by both parties hereto.”

It was argued for International that, since the sale to International was in a place in which sales were authorised by the licences and was in accordance with the licences, International obtained a good title to

the drugs free from all

Beecham's patents in any part of the world because the sale was authorised by Beecham under their licences and royalty had been paid thereon. It is conceded on the authority of *Société Anonyme des Manufactures de Glaces v. Tilghman's Patent Sand Blast Co. Ltd.* (1883), 25 Ch.D. 1, which I shall refer to as the *Tilghman's* case, that Bristol being a mere licensee could not import and sell the drug in Kenya without infringing the monopoly of Beecham's patents in Kenya. It was argued, however, that a purchaser from Bristol could sell the article in Kenya free from the monopoly of all Beecham's patents.

If Bristol had been assignees and the assignment had no restrictions attached then Bristol could have imported the drugs for sale in Kenya free from the monopoly of the Kenya patents: *Betts v. Willmot* (1871), L.R. 6 Ch. 239. These are the only two English cases which were cited to me.

Four American decisions were cited. The first two of these are *Adams v. Burke* (1873), 17 Wall. (84 U.S.) 543 and *Keeler v. Standard Folding Bed Company* (1895), 157 U.S. 659. These were both rather similar cases where the patentee of a United States patent assigned his rights to a dealer limited to a particular part of the United States, and it was held by a majority of the Bench in each of the cases that the sale by the assignee within the territorial limits of his assignment freed the purchaser from the monopoly of the patent throughout the whole of the United States. The court in each case had regard to the fact that royalties had been paid on the sales and adverted to the inconvenience that would result if the purchaser could not remove the patented article which he had bought within the territorial limit of the assignment into another part of the United States. The court adverted to the fact that the assignment did not limit the purchaser's rights on such sale. These were cases of assignment. All the patentee's rights with respect to the patented articles were assigned to the assignee subject to a territorial limitation, and if the patentee had himself sold the articles in that area, I think there could be no doubt but that he would have had no further rights under his United States patent as regards the articles so sold. It appears to me that his assignee could by virtue of the assignment also sell the articles free from further restraint under the United States patent. The result of the cases would have been the same if they had been tried in England. It is to be noted that in those cases patents in one country only were involved. The articles were sold in one part of the United States and were then used or sold by the purchaser in another part of the United States. Only the patent rights in the United States were involved, and the royalty on the same had been paid under the United States patent.

The third American case cited to me was *Boesch v. Graff* (1890), 133 U.S. 697. In that case a patentee held patents in Germany and in the United States. As far as the German patent was concerned another party had the right to manufacture and sell articles similar to the patented articles in Germany; not by way of assignment or licence from the German patentee, but irrespective altogether of the German patent and in no way dependent on any right derived from the German patentee. It was held that the mere fact that the articles made by such a manufacturer were free from the German patent did not mean that they were free from the United States patent. The facts are clearly distinguishable from the present case, but the decision shows that mere ownership of the goods which are free from a patent existing in one country does not necessarily involve freedom from a corresponding patent in another country.

A fourth American case has been cited to me, and it is the main case on which an American lawyer relied in his affidavit in support of the case for International. Another American lawyer has filed an affidavit in reply in which he says that this case is no authority for the proposition advanced on behalf of International. I shall have to deal with the judgment in some detail. The case is *Curtiss Aeroplane and Motor Corporation v. United Aircraft Engineering Corporation*

(1920), 266 Fed. 70 (2nd Cir.) which I shall call for short the *Curtiss* case. Counsel on each side have criticised certain passages in this judgment, but in my respectful opinion the basis of the decision is clear enough. The facts of the case appear to have been as follows:

The Curtiss Corporation of the United States entered into two agreements with the British Government on the same day. One of these agreements was an agreement on the part of the Corporation to manufacture and sell to the British Government aeroplanes of a certain type together with additional engines and spare parts therefor. The other agreement was an agreement to sell and deliver subject to payment of the purchase price to the Curtiss Corporation's subsidiary in Canada, the tools, machinery, drawing patterns, jigs, etc., of the Canadian Company for use in the manufacture of the seller's aeroplanes, including raw materials for manufacture and in process of manufacture at their plants in Toronto for use in the manufacture of such aeroplanes. By this agreement the seller further agreed that at the option of the buyer it would grant or cause to be granted to the buyer as part of the consideration moving from the seller to the buyer for the agreement the exclusive right and licence under any or all Canadian patents and applications for Canadian patents owned by the seller or by its Canadian subsidiary to manufacture such aeroplanes and/or engines within the Dominion of Canada for sale to or use by the British Government or the Government of any of its possessions but not for manufacture, use or sale otherwise. A royalty was payable on each such aeroplane manufactured and the exclusive licence was to be granted only on condition of payment of an additional premium.

There was a third agreement made by the Canadian subsidiary of the Curtiss Corporation of the United States and a company formed by the Imperial Munitions Board of Canada to take over the plant of the Corporation's subsidiary. The aeroplanes in question were made in Canada under these agreements for the British Government. These were war-time contracts made during the 1914 – 18 war and after the war the British Government sold the aeroplanes to the defendant in the suit, who was proceeding to sell them in the United States.

The judgment of the learned judge who delivered the judgment of the court, after stating the facts, proceeded to consider the effect of the agreements to which I have referred and held that in the very nature of things and in the language used in the agreements it was evident that the parties contemplated wide-spread use of the aeroplanes by the British Government in many countries and that if after the United States had entered the war the aeroplanes had been brought into the United States for use by Canadian aviators on United States aviation fields it would be difficult to believe that anyone would seriously contend that their introduction involved any violation of the plaintiff's patent.

Having decided that the contracts contemplated use of the aeroplanes by the British Government in many countries, not excluding the United States of America, the judgment adverted to the fact that under the contracts the aeroplanes and other articles should "become and be the absolute property of the British Government".

The judgment next proceeded to determine what right or rights passed to the British Government under its agreements with the plaintiff; and it was pointed out on the authority of certain cases that a contract which does not transfer the three rights to make, to use and to sell the patented article is a licence and so too is the right to make use of and sell the article for specified purposes only. The court decided that the British Government acquired the right to make the article under agreements which technically amounted to a licence, but it went on to decide that the right to make was general and unrestricted as to disposition

by the British Government and the court ultimately held that the British Government had under its licence the right to sell free from the monopoly of the American patent and that a purchaser from the British Government took the articles free from that monopoly. In arriving at this decision the court, according to my understanding of the judgment, proceeded to enquire as to whether such rights could devolve from a licence and it decided that this depended upon the scope of the licence in question.

I think with respect that if this case had been tried under British law the result would have been the same. The British Government had the right to make in Canada and to exercise and use. This would involve a right to sell. There was no restriction on where the articles were to be used, and in the circumstances of the particular contract the right included the right to use in the United States. There was no restriction imposed on sale by the British Government, and on such sale the buyer would take with all the rights of the vendor, that is the British Government, and would therefore be free from the monopoly of the United States patents.

The American court arrived at the same result by a somewhat different course of reasoning based partly on dicta from American decisions. The reports of these decisions are not all available to me, but in some of the references one can find indications of facts which distinguish them from the facts of the present case. In some of these dicta it is repeatedly said or suggested that payment of a royalty or other tribute frees the patented article from further tribute under the monopoly of the patents relating thereto. With respect, I think that may be so where the monopoly in question is a monopoly in respect of which the royalty or other tribute has already been exacted, as in *Adams v. Burke* (1873), 17 Wall. (84 U.S.) 543. Further where the patentee has himself sold the patented article it is freed from all his patents if there was no specific reservation because the purchaser gets all the vendor's rights in respect of the article. Thus in *Holiday v. Matheson* (1885), 24 Fed. 185, the owner of a patent in the United States sold one of his patented articles in England and that article was, of course, properly held to be free from the United States patent since it was sold by the patentee himself.

Again, if the patented article is sold by the patentee's agent within the scope of his authority then the purchaser has all the rights of the patentee in the same way as if it had been sold direct by the patentee. In fact, in law it would be a sale by the patentee. If the article is sold by a licensee the extent to which the article is released from the patentee's patent rights must depend upon the extent of the authority of the vendor. That is to say, on the extent of the authority conferred by the licence. It appears to me that this point was borne very much in mind by the court which decided the *Curtiss* case (1920), 266 Fed. 70 (2nd Cir.). That court decided that articles could be sold by a licensee in one country free from the monopoly of the patent in another country if the licence was wide enough to give the licensee authority to effect such a transaction. However, the court in its comment on the *Tilghman's* case (1883), 25 Ch.D. 1 in England clearly indicated its approval of the proposition that a licence such as the licence in the *Tilghman's* case, which it called a mere ordinary licence to operate under a foreign patent owned by the patentee of an English patent, did not authorise the licensee or a purchaser from him to import the patented article made under the foreign patent into England for sale there.

As a matter of fact the court in the *Curtiss* case (*supra*) mis-stated the facts in the *Tilghman's* case, but it did so in a manner and with results which are no help at all to International in the present case. In the *Tilghman's* case the owner of similar patents in England and Belgium licensed a licensee to make, use and sell the patented articles in Belgium under the Belgian patent. The licensee imported patented articles so made in Belgium into England for sale, and it

was held to have infringed the monopoly of the English patent. The learned American judge who delivered the judgment of the court in the *Curtiss* case said that a third party had purchased the patented article in Belgium and imported it into England, but that was not in fact the case. If it had been the case then that case would be quite similar to the present case. It would be similar enough to constitute an authority against the contention argued on behalf of International. Yet the American court appears to have been prepared to accept the position that, on the facts which it stated as the facts in the *Tilghman's* case, the importation of articles made by a mere ordinary licensee under his licence in Belgium was an infringement of the English patent even when imported to England by a purchaser in Belgium from the licensee.

Regarding the argument which appears to have found favour with the American courts that when a patented article has been sold by one who was authorised to sell it and who has paid a royalty or other considerations to the patentee in respect of that sale, then the article is released completely from the monopoly of the patent, I would say with all due respect that that may be the case as regards sales by a licensee of rights under patents of the country in which the sale took place and rights conferred by licence in respect of patents in other countries if there is nothing to the contrary contained in the agreement. I, however, respectfully do not agree that on such a sale in one country by a bare licensee the article is necessarily freed from the licensor's monopoly under unlicensed patents in other countries, and I am not at all convinced that the American court in the *Curtiss* case went so far as to lay that down as a rigid principle of law. On the contrary I think that the American court's comments on the *Tilghman's* case showed that the American court would not have adopted so wide an application as a principle of law. I am now, of course, speaking of a purchaser's right on a sale by a bare licensee and not on the sale by the patentee or his agent or assignee.

In the case of a sale by a licensee the matter must depend on the extent of the authority conferred on the licensee by the licensor under the licence or other agreements between them. In this case the American or Panamanian patents are not the same patents as the patents registered in Kenya, and it follows that a release or discharge from the monopoly of the United States or Panamanian patents does not necessarily imply a release from the Kenya patent. Whether there is such a release from the Kenya patent must depend upon the contract. The mere ownership of the patented articles does not imply a discharge from foreign patents. See *Boesch v. Graff* (1890), 133 U.S. 697 in America and the *Tilghman's* case (1883), 25 Ch.D. 1 in England. In order to obtain freedom from the Kenya patent there must be a sale with the authority of the patentee in Kenya, and I would say that that authority must amount to an authority to discharge the patented article from the operation of the Kenya patent.

In the *Curtiss* case (1920), 266 Fed. 70 (2nd Cir.) the licensee had authority to use the patented articles in the United States. That was so held, and it would follow that he could sell free from the United States patent. That authority was granted by the patentee, and so bound the patentee.

I now turn to the summary of the court's conclusions in the *Curtiss* case to be found at the end of the judgment:

"It is admitted that if the aeroplanes which are alleged to infringe had been built in Canada under a limited licence or under a Canadian patent and then brought into the United States infringement would have been made out. But that is not this case."

This passage has been criticised by counsel before me because some at least of the aeroplanes were built under Canadian patents and under a licence. I think

with respect that the court meant that they were not built under a limited licence or exclusively under Canadian patents. The court had already held that the use of the aeroplanes was not limited territorially and that the contracts extended to the benefit of the United States patents as well as the Canadian patents. This part of the summary should be read subject to what followed:

“It appears that the aeroplanes complained of were manufactured under a licence from the plaintiffs and with the latter’s active assistance and that they contained engines furnished by the plaintiffs with the intent that they should be so used.”

I pause here to comment that this passage, in my view, was directed to show that the plaintiff was itself a party and privy to the manufacture of the aeroplanes for the British Government’s use. The summary then adverted to the amount of the consideration that was paid to the plaintiff and then stated:

“It appears that the licence under which the aeroplanes were manufactured contained no restriction or limitation as to time or place or manner of use of the aeroplanes, nor as to the ultimate disposition which might be made of them and that they were therefore freed from the monopoly of the plaintiff’s patents.”

The facts stated in this summary are different from the facts of the present suit. There the licence was not a limited licence. In the contracts involved in this suit I think the licence only extended to the licensed patents which did not include the patents registered in Kenya. There is a provision that only one royalty was to be paid with respect to the same unit of licensed products regardless of the number of claims covering the same for the manufacture and use thereof existing in licensed Beecham’s patents and in pending patent applications listed in or added to the schedule. Beecham’s patents in Kenya are already outside the scope of this provision.

In the *Curtiss* case (*supra*) the patentee in the United States was virtually in the position of the vendor of the aeroplanes to the British Government and privy to the sales which were unrestricted as to use by the British Government. In the present case, Beecham was not privy to the sale to International, was not the vendor and never released or authorised the release of the licensed articles from the monopoly of the Kenya patent. All the terms are stated to be contained in the contract, and nowhere in the contracts is there any release or any power of release given in respect of the Kenya patent. On the contrary there clearly are reservations in respect of the Kenya patent.

Bristol had a power of sale; such sale conveyed all Bristol’s rights. I cannot see that it conveyed rights which were reserved by Beecham and not given to Bristol.

Preparations of pencillin are in their nature expendable. Once a dose is administered the pencillin is expended and cannot be used again.

Even if one could imply additional terms into the contract there is no necessity to do so. There was ample scope for use under the licensed patents covering the world, with the exception of Kenya and other Commonwealth countries. There is no necessity to imply an extension involving use by a purchaser in Kenya free from the monopoly of patents registered in Kenya. Beecham was not the seller. Bristol was the seller. International became the owner, the absolute owner insofar as Bristol could give absolute ownership; but that does not give freedom from the patents in another country where the patentee has not authorised a sale free from his patents in the other country. There is no necessity to imply that the sale is to be free from Kenya patents. In my view, from the arguments before me and the facts so far as they have been disclosed,

a good *prima facie* case of infringement of Beecham's patent rights in Kenya has been established.

On the question of the balance of convenience, I am quite sure that this is a case in which the temporary injunction sought should be granted.

Temporary injunction ordered.

For the plaintiff:

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Kaplan and Stratton, Nairobi

For the defendant:

PJ Wilkinson, QC and *JDM Silvester*
Hamilton, Harrison & Mathews, Nairobi

Madhwa and others v City Council of Nairobi
[1968] 1 EA 406 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	18 March 1968
Case Number:	1208/1967 (90/68)
Before:	Harris J
Sourced by:	LawAfrica

[1] *Constitutional Law – Citizenship by registration – Effect of delay in registering person entitled to citizenship – Whether such person to be treated as a citizen pending registration – Kenya Constitution, ss. 2 (1), 10 and 26 (2) (K.).*

[2] *Constitutional Law – Discrimination – Non-citizens evicted from market stalls by City Council of Nairobi under “Africanization” policy – Whether Council acting by virtue of any written law or in performance of functions of any public office – Whether non-citizens protected – Whether eviction would amount to discrimination – Whether notices to quit effective – Kenya Constitution, ss. 6, 10, 14, 26, and 28 (1) (K.).*

[3] *Constitutional Law – Fundamental Rights – Whether non-citizens entitled to protection of fundamental rights under Constitution of Kenya – Whether eviction of non-citizens from market stalls by City Council of Nairobi under “Africanization” policy discriminatory – Whether notices to quit effective – Kenya Constitution, ss. 6, 9, 10, 14, 26 and 28 (1) (K.).*

Editor's Summary

The six plaintiffs were the holders of stalls in the municipal market on monthly terms from the defendant council. All of them were Asians and citizens of the United Kingdom and Colonies. None were citizens of Kenya. Four of them, however, having been born in Kenya, had applied before December 12, 1965 for registration as citizens of Kenya under s. 2 (1) of the Kenya Constitution, but their applications were still pending. The Council's Social Services and Housing Committee resolved to "Africanize" the market by evicting non-Africans from it in favour of Africans. This resolution was ratified by the Council; and the plaintiffs in August, 1967 were given notice to quit their stalls in pursuance of this resolution. In subsequent correspondence the Council confirmed that it was its policy to allocate the stalls to "Kenya citizens of African origin". The plaintiffs then brought this action for declarations (*inter alia*) that the resolution and the policy of the Council were unconstitutional and unlawful as being discriminatory and that the notices to quit were void. The four plaintiffs who had applied for registration as citizens contended that under s. 2 (1) of the Constitution they had an absolute right to be registered as citizens and should be treated as citizens for the purpose of the suit.

Held –

- (i) the defendant Council, not being the authority charged with issuing certificates of citizenship, was not in any way responsible for the delay in registering the four plaintiffs who had applied for registration; and all the six plaintiffs should be treated alike as not being citizens of Kenya (observation obiter that if this had been a suit instituted by the Government against persons in a similar position to those four plaintiffs some form of estoppel based on the delay might possibly have arisen);
- (ii) the defendant Council, in giving notice to the plaintiffs to vacate the market stalls, came under the ambit of the description “any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority” as used in s. 26 (2) of the Constitution; and was not merely exercising a right incident to the position of a landlord;
- (iii) the plaintiffs, notwithstanding that they were citizens of the United Kingdom and Colonies and were not citizens of Kenya, were entitled under s. 28 (1) of the Constitution to come to the court without relying upon or being limited by the provisions of s. 10 thereof; and were to be regarded as “persons” within the meaning of s. 26 (2);
- (iv) the resolution complained of was “discriminatory” within the meaning of s. 26 (2) of the Constitution by reason of the preference shown in favour of those persons who in the resolution were termed “Africans” as against “non-Africans”; and the giving of the notices to quit in pursuance of the resolution constituted treating the plaintiffs in a discriminatory manner contrary to s. 26 (2);
- (v) the notices were void and ineffective.

Observations: (i) on the effect of s. 26 (6) (a) of the Constitution as read with s. 26 (4) (a) as to statutory provisions having specific reference to non-citizens as distinct from citizens.

(ii) on whether the resolution and the policy of the Council were themselves unlawful.

Declarations granted. Notices to quit declared void.

No cases referred to in judgment

Judgment

Harris J: This is an action brought by the holders, as monthly tenants, of some stalls in the municipal market in Muindi Mbingu Street in the City of Nairobi who, having been served by the defendant Council with notices to quit, seek to have the notices declared void as conflicting with certain provisions of the Constitution, the defendant restrained from evicting the plaintiffs, and other relief.

The facts of the case may be shortly stated. On November 7, 1966 a committee of the defendant Council known as the Social Services and Housing Committee passed a resolution in the following terms:

“Africanization of Commerce: Municipal Markets.

Resolved:

- (i) That the Director of Social Services and Housing be congratulated on the manner in which he has conducted this matter with the Ministry of Local Government and that his views be endorsed by this

committee.

- (ii) That this committee reiterates the Council's policy of Africanization of commerce in accordance with the Government's policy as evidenced by various resolutions of this Council.

- (iii) That, so as to accelerate the Africanization of the City Market, the present stand-holders who are non-Africans be given three months' notice to terminate their tenancies with this Council and that the officers be authorised to invite applications from suitable Africans for the tenancies of such stalls.
- (iv) That an application be sent to the appropriate Ministry through the Ministry of Local Government for a loan of £20,000 to be used by Council in assisting the African traders who will be allocated the stalls mentioned in para. (iii)."

It was common case that this resolution was ratified at a meeting of the defendant Council on December 6, 1966, and the hearing proceeded on the footing that the resolution had become that of the defendant.

The first two plaintiffs are the tenants respectively of stalls No. 10 and No. 11 in the market, where they carry on their separate businesses, and the remaining plaintiffs are tenants of stall No. 45 where they are jointly carrying on business. All the plaintiffs are Asians by race and citizens of the United Kingdom and Colonies and none of them is a citizen of Kenya. Each of the first four was born in Nairobi and, none of their parents having been born in Kenya, they had applied prior to December 12, 1965 for registration as citizens of Kenya under s. 2 (1) of the Constitution and are still awaiting the results of their applications.

By letters dated August 1, 1967 addressed to and served upon the plaintiffs, the defendant required them to quit and deliver up possession of their respective stalls on or before October 31, 1967. On September 5, 1967 Messrs. Waruhiu & Co., the plaintiffs' advocates, wrote to the defendant to seek verification of a rumour that its policy was to lease the stalls to persons who were citizens of Kenya but of African origin, and by letters dated September 8 and October 11 the defendant confirmed that it was its policy that the stalls be allocated to "Kenya citizens of African origin" and that the notices to quit had been served under the terms of the resolution set out above.

Consequent upon this correspondence the present action was filed. In their plaint the plaintiffs contend that the notices to quit were given by the defendant in the performance of its functions as a public authority purportedly acting under the powers conferred upon it by the Local Government Regulations 1963, and in pursuance of the policy and implementation of the resolution above mentioned, that both the policy and the resolution violate the provisions of ss. 14 and 26 (2) of the Constitution of Kenya, and that their implementation as against the plaintiffs would amount to unlawful discrimination and an infringement of the plaintiffs' constitutional rights. In the prayer to their plaint they seek declarations to the effect that the said policy and resolution are unlawful, that their implementation would be unlawful, and that the notices to quit are void, together with orders restraining the defendant from evicting them severally from the premises in pursuance of the said notices "or any other notices to quit given or process taken hereafter in implementation or pursuance of the said or any similar policy or resolution."

Before considering the main issues in the case it is necessary to deal with a preliminary proposition put forward by counsel for the plaintiffs.

Section 1 (1) of the Constitution declares that:

"Every person who, having been born in Kenya, is on December 11, 1963 a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Kenya on December 12, 1963:

Provided that a person shall not become a citizen of Kenya by virtue of this subsection if neither of his parents was born in Kenya."

Section 2 (1) provides that:

“Any person who, but for the proviso to sub-s. (1) of s. 1 of this Constitution, would be a citizen of Kenya by virtue of that subsection shall be entitled, upon making application before the specified date in such manner as may be prescribed by or under an Act of Parliament, to be registered as a citizen of Kenya.”

The specified date referred to in s. 2 (1) was, by virtue of s. 2 (6) (a), December 12, 1965, and it was established on the evidence of an officer in charge of citizenship in the immigration department of the Government that a very large number of applications for citizenship had been received immediately before that date of which some thousands, including those of the first four plaintiffs, were still to be dealt with. Relying upon the foregoing facts and the provisions of s. 2 (1) counsel contended that each of the first four plaintiffs had in law an absolute right by reason of his birth to be registered as a citizen and could not legally be refused, and that therefore each of the four should be treated for the purpose of this suit as if he had become and were now a citizen by registration. In support of his contention he contrasted the provisions of s. 2 (1) with those of s. 6 (1) which, as originally framed, conferred upon citizens of certain other countries, who fulfil the prescribed requirements, a right to be registered as citizens of this country, but which has since been amended to reduce that right to mere eligibility for such registration in the discretion of the appropriate minister.

If this were a suit instituted by the Government against persons in a position similar to that of these four plaintiffs and depending for its success upon the fact that they had not yet obtained certificates of registration as citizens it might be that a defence in the nature of some form of estoppel, based upon the provisions of s. 2 (1) and the delay which has occurred in dealing with the applications, could be raised with a possibility of success. In the present case, however, the defendant is not the authority charged with issuing the certificates and is in no way responsible for the delay which has ensued and in my opinion all six plaintiffs must be treated alike as being what in fact they are, namely, persons who are not citizens of this country but who were on December 11, 1963 and still are citizens of the United Kingdom and Colonies. For reasons which will appear later it is, in my view, immaterial for the purpose of this suit whether or not they are citizens of Kenya.

Turning now to the main question in the case the following specific issues arise for determination:

1. Were the notices to quit given by the defendant acting by virtue of any written law or in the performance of the functions of any public office or any public authority within the meaning of s. 26 (2) of the Constitution?
2. Do the plaintiffs or does any of them fall within the protective provisions of the said section?
3. Did the action of the defendant in giving notice to the plaintiffs to quit the market stalls pursuant to the said resolution constitute treating the plaintiffs or any of them in a discriminatory manner contrary to the provisions of the said section?
4. Did the notices to quit effectively terminate the tenancies in the market stalls of the respective plaintiffs or of any of them?

Originally introduced as a schedule to the Kenya Independence Order in Council 1963, the Constitution has been substantially refashioned by the legislature of this country and, in its present form, may be said to represent the written

expression of the majority will of the entire adult population. It declares and defines the basic rights, freedoms and safeguards upon which the application of the rule of law in this State is founded and by means of which it is secured. It binds and, in turn, benefits, to the extent accorded by its provisions, all persons within the realm. It is susceptible of amendment by Parliament but nevertheless it takes precedence over all other legislative enactments. In the present action the plaintiffs assert that the defendant, by its conduct, has committed a breach of ss. 14 and 26 (2) of the Constitution and they invoke the aid and protection of the High Court. Their right so to do is itself assured by s. 28 (1) and it therefore becomes the duty of the court to examine their claim and, if the breach so complained of be established, to lend that aid and protection, so far as may be appropriate.

The Constitution is divided into a number of chapters and schedules, the former being sub-divided into sections. Chapter II, which comprises ss. 14 to 28, is intituled "Protection of Fundamental Rights and Freedoms of the Individual" and its primary scope and application are indicated by s. 14, which is as follows:

"Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –

- (a) life, liberty, security of the person and the protection of the law:
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

It is to be observed that this section is declaratory of the rights of the individual as a human person without reference to any matter of nationality, citizenship or domicile but, as will be seen, among the limitations referred to in the section are certain restrictions to be found in s. 26 with respect to persons who are not citizens of Kenya. The material provisions of s. 26 are as follows:

- "(1) Subject to the provisions of sub-ss. (4), (5) and (8) of this section, no law shall make any provision that is discriminatory either or itself or in its effect.
- (2) Subject to the provisions of sub-ss. (6), (8) and (9) of this section, no persons shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded

- privileges or advantages which are not accorded to persons of another such description.
- (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision –
 - (a) with respect to persons who are not citizens of Kenya:
 - (b), (c), (d). . .
 - (6) Subsection (2) of this section shall not apply to –
 - (a) anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in sub-s. (4) of this section.
 - (c) . . .”

Subsections (5), (8) and (9), although referred to in sub-ss. (1) and (2), do not appear to have any direct bearing upon the present case and it is not necessary to set out their terms.

The provisions upon which the plaintiffs principally rely are those contained in ss. 14 and 26 (2), and the first issue is as to whether the defendant, in giving the notices to quit, was acting “by virtue of any written law or in the performance of the functions of any public office or any public authority” within the meaning of s. 26 (2). I am satisfied that the defendant, in granting to the plaintiffs their present tenancies in the market premises, was acting by virtue of its powers under the Local Government Regulations 1963, or the relevant legislation which was replaced by these Regulations, and I am also satisfied that the defendant is a public authority. Counsel for the defendant contended, however, that in giving the notices to quit, the defendant was acting, not in the manner referred to in s. 26 (2), but purely as a landlord and therefore was not brought within the ambit of the subsection. He argued that, although it was a function of the defendant under the Regulations of 1963 to provide, maintain and let city markets, the giving to one of its tenants in such a market of a notice to quit was nothing more than the exercise of a right incident to the position of a landlord irrespective of any other powers or functions attaching to it.

This, it seems to me, is an over-simplification. There can be no doubt that, having created as between itself and the plaintiffs the relationship of landlord and tenant, the defendant, equally with the plaintiffs, became entitled to enjoy, subject to any particular limitations applicable by reason of its being a local authority, the usual rights of landlord and tenant respectively appropriate to the tenancies so created, and that these rights included, on the part of the defendant, the right to terminate each of the tenancies by due service of a proper notice to quit. When a lessor is a private person who has made a letting of property to which he is beneficially entitled it may well be said that the only legal considerations to be borne in mind in considering his activities connected with the letting are those flowing from his position of landlord, and that the only branch of law primarily relevant to those activities is the law of landlord and tenant. If, however, instead of being beneficially entitled he were a trustee of the property his power of so dealing with it would be limited by the terms of the trust, either to be gathered from the instrument creating it or to be found in the legislation relating to trusts or otherwise, and, as a trustee, unless he be endowed with the power to grant leases he cannot do so. Likewise, in the case of a statutory body, unless it be invested with leasing powers it cannot lawfully grant leases and if it be so invested it can grant leases only to the extent and for the purpose authorised by those powers. These considerations apply generally to the exercise of leasing powers by limited owners and statutory bodies and, no doubt, in each case a power to grant leases includes by implication a power to terminate them for such a power is inherent in the relationship so created,

but in my opinion the exercise of that power consequent upon the granting of a lease under statutory or other special authority cannot properly be divorced from that authority and regarded as arising merely from the law of landlord and tenant. Being itself a creature of statute such a body can have no existence apart from the statutory provision which creates it, and it can lawfully execute no act and perform no function save such as it is empowered by law to execute and perform. Thus if, in the course of its operations, it should buy or sell goods, employ labour, or lease its premises, it no doubt brings itself within the purview of the law relating to the sale of goods, master and servant, and landlord and tenant respectively, but this extension of its juridical activities in no way takes it outside the operation of the field of law to which, as a creature of statute, it is inherently subject.

For the reasons which I have indicated I am satisfied that the defendant, in giving notice to the plaintiffs to vacate the market stalls, came within the ambit of the description “any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority” as used in s. 26 (2) and that the first of the issues set out above must be answered in the affirmative.

In regard to the second issue the defendant did not seek to rely upon s. 26 (6) and I shall consider this issue in the first place without regard to that subsection. The plaintiffs’ contention is that they come within the term “persons” in s. 26 (2), while the defendant maintains that, being citizens of the United Kingdom and Colonies, they fall within the provisions of s. 10 of the Constitution in addition to those of s. 26, with the result, it is said, that their rights under the latter section are restricted accordingly. Section 10 (1) provides (*inter alia*) that a citizen of the United Kingdom and Colonies shall enjoy the same rights and privileges (being rights and privileges which under Kenya law are enjoyed by citizens of Kenya) as a citizen of Kenya enjoys “under the constitution of the country concerned”, that is, the United Kingdom and Colonies, “or under any other law in force in that country”. One result of this, the defendant submits, is to deprive the plaintiffs of their right of action for the reason that, under the law of the United Kingdom, the present suit would be unsustainable. A second result, it is argued, is to attract the operation of sub-s. (4) of s. 26, which, in turn, would render the provisions of sub-s. (1) inapplicable. It is necessary to examine these contentions with care.

Section 10 falls within Chapter I of the Constitution, which relates only to citizenship, and there can be no justification for so reading that chapter as to deprive Chapter II of its quality of being, as it is clearly intended to be, a comprehensive statement of the fundamental rights and freedoms of the individual. In my opinion, the plaintiffs, notwithstanding that they are citizens of the United Kingdom and Colonies and are not citizens of this country, are entitled under s. 28 (1) to come to this court for the enforcement of their rights under s. 26 (2) without relying upon or being limited by the provisions of s. 10. If I am correct in this it follows that the court is relieved of the somewhat difficult task of attempting to construe the terms of s. 10 (1) and to apply them to the circumstances of this case. Furthermore, I can see nothing in s. 10 (1) to attract the application of s. 26 (4) but, even if there were, the ultimate result would be merely to exclude from this case the operation of s. 26 (1) upon which, however, the plaintiffs do not seek to rely. The plaintiffs’ claim to come within the term “persons” as used in s. 26 (2), on the other hand, is supported, not only by the language of s. 14, but also by the provisions of the first schedule to the Constitution of Kenya (Amendment) Act 1965, which amends s. 25 (1) by substituting for the word “person” the words “citizen of Kenya”, while leaving unamended the words “person” and “persons” wheresoever else they occur in

Chapter II, thereby implying that those words, when used in that chapter, do not necessarily import citizenship.

For these reasons I am satisfied that, whatever be the effect of s. 10 (1), the plaintiffs are to be regarded as “persons” within the meaning of s. 26 (2) and that the second issue must also be answered in the affirmative.

With respect to the third issue, the defendant submits that what it has done in regard to the plaintiffs does not amount to treating them “in a discriminatory manner” within the contemplation of s. 26 (2). Seeking to construe the resolution in the light of the definition of the term “discriminatory” in sub-s. (3) of the section, counsel for the defendant in his able argument contended that the term “African” does not mean a member of an indigenous African race or a person who was or whose forefathers were born in Africa but that logically it should be taken to mean a citizen of any country on the continent of Africa extending from and including Algeria in the north to the Republic of South Africa in the south and without regard to race, colour or place of origin, and that the cognate expression “Africanization” should be construed accordingly and so as not to be confused with what is sometimes called “Kenyanization”. In support of this proposition he referred to the definition of the word “African” to be found in the third edition, reprinted and published in the year 1965, of the work known as “The Shorter Oxford English Dictionary on Historical Principles”, at p. 33, reading “belonging to or characteristic of, a native or inhabitant of, Africa”. He sought to distinguish the definition in s. 5 (1) of the Interpretation and General Provisions Act (Cap. 2) on the ground that the object of that provision was to give the term a restricted meaning for the purpose only of written laws, and he invited comparison with the use of the expression “South American” to designate a citizen of any of the several states in that continent.

The contention that the term “African” should be taken to mean a citizen of any country on the continent of Africa is at variance with the pattern of s. 6. By sub-s. (1) of that section it is declared that any person who is either a Commonwealth citizen or a citizen of any country in Africa to which the subsection applies and who has been ordinarily resident in Kenya for such period and under such authority as may be prescribed by law may, in the discretion of the appropriate minister, be granted citizenship of Kenya. By sub-s. (3) it is provided that the countries in Africa to which sub-s. (1) applies (apart from those falling within s. 9) are such countries as are for the time being declared by the Minister to be countries affording reciprocal rights to Kenya citizens. It is clear, therefore, that the provisions of s. 6 do not extend, automatically, to the citizens of every country on the continent of Africa but are limited to the citizens of such of those countries as either come within s. 9 or for the time being come within s. 6 (3). Although this factor does not control the meaning of the words used in the resolution, it is perhaps not without some significance as a criterion of the correctness of the interpretation of the resolution suggested by counsel for the defendant.

Even if the defendant’s construction be correct, which is very doubtful, the resolution nevertheless would appear clearly to fall within the definition of “discriminatory” in s. 26 (3) by reason of the preference shewn in favour of those persons who in the resolution are termed “Africans”, whatever that word may mean, as against those other persons who are termed “non-Africans”. This conclusion gains support from the correspondence with Messrs. Waruhiu & Co. already mentioned, in which the defendant, in response to an inquiry as to this very matter, stated that its policy was that “the stalls in this market be allocated to Kenya citizens of African origin”, thereby importing in respect of its policy an enhanced element of discrimination in favour of persons who

come within the description of “Kenya citizen of African origin” as against those who do not.

Although not relied upon by the defendant, there might at first appear to be an answer to the plaintiffs’ claim in sub-s. (6) of s. 26 which, by para. (a), excludes the application of sub-s. (2) to anything expressly or by necessary implication authorized to be done by any such provision of law as is referred to in sub-s. (4) set out above. The effect of this paragraph, read together with para. (a) of sub-s. (4), would appear to be that no law can be invalidated under s. 26 (1) so far as it makes provision with respect to persons who are not citizens of Kenya, and that no act or thing can be invalidated under s. 26 (2) if it was expressly or by necessary implication authorised to be done by any such statutory provision. If, therefore, the acts of the defendant which the plaintiffs seek to impugn had been authorised by a statutory provision having specific application to non-citizens as distinct from citizens they would not have been open to challenge under s. 26. No evidence was adduced, however, upon which it would be possible to bring the defendant’s acts within the protection of sub-s. (6) of that section nor did the defendant seek in argument to place reliance upon it.

It is not disputed that the notices to quit were given in pursuance and implementation of the resolution, with the result that the giving of the notices constituted treating the plaintiffs and each of them in a discriminatory manner contrary to the provisions of s. 26 (2). The third issue must therefore be answered in the affirmative.

Turning to the fourth issue, it is clear that a notice to quit given or any other overt act done in implementation of a resolution, the passing of which was in conflict with the Constitution, is ipso facto void, and accordingly the notices given in the present case were void in law and ineffective to terminate the tenancies of the plaintiffs, or of any of them, in the market stalls. The fourth issue must therefore be answered in the negative.

For the reasons which I have stated I am of the opinion that the action succeeds and it now becomes necessary to consider the relief to which the plaintiffs are entitled.

It is manifest that the apparent purpose of the resolution, unsupported, as it is, by any statutory provision coming within s. 26 (4) (a), is to some extent inconsistent with the intention of s. 26 (2) of the Constitution, and on this footing the plaintiffs seek an order declaring that the resolution, together with the policy that inspired it, is unlawful. Apart from the procedural steps involved, the formulation of a policy and the passing of a resolution, as distinct from the implementation of the one or of the other, are primarily intellectual or mental exercises rather than physical or overt acts and it is not clear that *prima facie* either could be said strictly to be unlawful per se by virtue of s. 26 (2), designed, as it is, to prohibit the actual “treatment” of any person in a discriminatory manner. Indeed, in the realm of criminal jurisprudence it is the accepted position that in principle an intent, as distinct from an attempt, to do an act which, if done, may be unlawful is not per se unlawful unless the law specifically so provides or requires. This aspect of the matter, which in the present case is largely academic, was not canvassed by counsel during the hearing and, there being no suggestion of a procedural irregularity relating to the formulation of the policy or to the passing of the resolution, I am not prepared, in the absence of any persuasive authority, to declare that either the policy or the resolution, although capable of being implemented in an unlawful manner, was in itself unlawful.

Having regard to my findings generally, however, and to the circumstances of the case as a whole, I am satisfied that the plaintiffs are entitled to declarations to the effect that any acts done or to be done by the defendant by way of

implementation of the resolution already mentioned are or would be, as against the plaintiffs and each of them, contrary to the provisions of s. 26 (2) and therefore unlawful and, as a corollary, that the notices to quit given by the defendant to the plaintiffs are void. There will be an order accordingly. In addition, it is reasonable that the plaintiffs and each of them should be protected from further disturbance in purported pursuance either of the resolution referred to or of the notices to quit already given and there will be an order restraining the defendant in that behalf. There will be liberty to each party to apply should any difficulty arise in working out the terms of these orders.

The plaintiffs also seek what in effect would be an order to restrain the defendant from evicting them from their stalls in pursuance of any notices to quit or other process that might be given or taken hereafter in implementation or pursuance of any future policy or resolution similar to those referred to and not saved from invalidation by s. 26 (6) (a). It has not been shewn or suggested that the defendant, in pursuing the course which it has followed, had any intention of deliberately adopting a policy or passing a resolution which would or might conflict with the provisions of the Constitution, or that there is any reason to suppose that it would seek to do so in the future, and I am not satisfied that it would be proper to grant the further relief so sought.

Orders accordingly.

For the plaintiffs:

*JA Mackie-Robertson, QC and Menezes
Waruhiu & Co, Nairobi*

For the defendant:

*PA Clarke
PA Clarke, City Council of Nairobi*

Robson and another v Commissioner of Income Tax [1968] 1 EA 415 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 24 May 1968

Case Number: 23 and 24/1967 (91/68)

Before: Harris J

Sourced by: LawAfrica

[1] *Advocate – Guarantee given by – For repayment of loan made to client – Whether constitutes money-lending – Whether such practice proper – Whether money paid under such guarantee deductible by advocate for income tax purposes.*

[2] *Advocate – Remuneration of – By charge per film made by client company and by percentage of*

profits of client company – Whether improper or unprofessional – Advocates Act, s. 48 (2) (K).

[3] Income Tax – Deduction – Expenditure – Partner in firm of advocates giving guarantees as director of client company to Bank for overdraft of company and to other clients for loans to company – Company wound up – Partner required to pay shortfall under guarantees – Money paid out by firm – Partner and firm to be remunerated for services rendered by partner to company partly by fees, partly by flat charge, partly by percentage of profits – Whether amounts so paid out under guarantees deductible as expenditure incurred in production of income – East African Income Tax (Management) Act 1958, ss. 14 (1) and 15.

[4] Income Tax – Deduction – Guarantee – Director of company making payment under guarantee given by him for debt of company – Whether deductible – Whether capital loss or revenue loss.

Editor's Summary

The two appellants were advocates practising in partnership in Nairobi principally in commercial, conveyancing and general law. Both appellants were directors of various companies and their remuneration as such was paid into their firm. The firm was employed to form a film company, of which the first appellant was made a director, and in which he personally invested some money. An overdraft was obtained for the company from a bank on the security of a personal guarantee given to the bank by the first appellant which was, however, regarded as a liability of the firm. Other funds were raised for the company from clients of the firm on guarantees formal and informal given by the first appellant for repayment. These funds were paid to the company through the client account of the firm. The first appellant and the firm were to be remunerated by the company for services rendered to it partly by professional fees for specific work; partly by a charge per film completed by the company to cover day to day legal advice and all other work done by the first appellant in the offices of the firm or at board meetings of the company; and partly by a percentage of the gross profits of the company. The company went into liquidation, and the first appellant was called upon to pay, and the firm in fact paid, a total of some K. £8,000 under the various guarantees given by the first appellant to the bank and others. This amount was written off in the firm's accounts as a bad debt and the appellants claimed, in arriving at their total income for the relevant years of income, to deduct it as expenditure wholly and exclusively incurred in the production of income under s. 14 (1) of the East African Income Tax (Management) Act 1958. The Commissioner of Income Tax, relying on s. 15 of that Act, disallowed the deduction. Against that decision of the Commissioner the appellants brought this appeal. On appeal it was argued for the Commissioner that to give an undertaking to cover a loan was as good as lending the money so that the transactions in question were a form of money lending; that the transactions really represented investments made by the first appellant; that the method of remuneration by a percentage of profits was inconsistent with the work having been done by the first appellant as an advocate; and that the loss was a capital and not a revenue loss. Evidence was called as to the practice of advocates in Nairobi about remuneration in these circumstances.

Held –

- (i) advocates practising in Kenya are required in a variety of circumstances to give undertakings regarding the payment of moneys which are binding on them personally; and this does not constitute money-lending;
- (ii) the agreed remuneration of an advocate by a percentage of profits is not inconsistent with the work covered thereby having fallen properly within the scope of the professional activities of an advocate;
- (iii) the transactions concerned were not loans but were payments made in discharge of the liabilities of the firm or of the first appellant by reason of undertakings given or obligations incurred in the ordinary course of his business as an advocate (*Hagart's case* (3) distinguished; *Jennings' case* (2) adopted);
- (iv) the amount concerned was properly deductible under s. 14 (1) and was not precluded from being

deductible by s. 15 of the East African Income Tax (Management) Act 1958.
Appeals allowed.

Cases referred to in judgment:

(1) *Jennings v. Barfield and Barfield*, [1962] 2 All E.R. 957; [1962] 1 W.L.R. 997.

(2) *Morley v. Lawford & Co.* (1928), 14 Tax Cas. 229.

(3) *Hagart and Burn-Murdoch v. Commissioners of Inland Revenue*, [1929] A.C. 386.

Judgment

Harris J: These two appeals were heard together, the questions of fact and of law which arise being common to both. Strictly speaking it would appear that possibly, since each appellant is challenging three separate assessments against himself, there should have been no less than six appeals in all, but the multiplicity of proceedings and general inconvenience which would have resulted from the adoption of this course were avoided by reason of the respondent, the Commissioner of Income Tax, through his counsel, agreeing, subject to the approval of the court, to waive any technical objection which he might have taken in that regard. The court has no hesitation in expressing its approval of such waiver.

The appeals are brought from the decision of the Commissioner dismissing the appellants' respective objections to assessments to tax for the years of income 1962, 1963 and 1964. The only issue involved is as to whether certain sums of money paid by and representing losses borne by the appellants, and which were written off by them in their partnership accounts as bad debts, are properly deductible in arriving at their total income under s. 14 (1) of the East African Income Tax (Management) Act 1958, and are not precluded from being deductible by s. 15.

The appellants are, and have been for a number of years, advocates practising in partnership in Nairobi under the style of "Robson, Harris & Co." (to which I will refer as "the firm") and they now comprise the sole members of the firm. For some years down to the year 1961 there had been in the firm a third partner, named Harris, who, however, died during that year. The profits and losses of the partnership are now and at all material times since the death of Mr. Harris have been shared by the appellants in the proportions of seven-twelfths to Mr. B. J. Robson (to whom I will refer as "Mr. Robson") and five-twelfths to Mr. A. W. Robson. The nature of the business carried on by the partnership is that of advocates practising principally commercial, conveyancing and general law, and the firm numbers among its clients many limited liability companies. Mr. Robson stated in evidence that he is a director of some sixteen such companies, that he accepted the directorships invariably at the request of the promoters of the companies or of the other directors, and that he thought the reason for his being so requested was to ensure that his legal and commercial experience of business matters in this country would be available to the respective companies and their directors. He said that in the majority of cases he was not asked to and did not in fact subscribe for any portion of the share capital of the companies concerned. Mr. A. W. Robson is also a director of some such companies, while of others he is the secretary. All remuneration received by either of the partners from these sources is treated as portion of the firm's professional earnings as advocates and in recent years the firm's income has been made up to the extent of at least twenty per cent. in this way.

At some time prior to the year 1955, Mr. Robson was approached by certain persons in the motion picture business who were interested in promoting a company which when formed was known as Phoenix Productions Ltd. (to which I will refer as "the company"). The company was duly formed and registered in Kenya, the legal work in relation to the formation being carried out by the firm. Its nominal share capital was £100 and its main purpose, as its name suggests, was the production of motion pictures. Mr. Robson was asked to become a director, which he did, and was allotted two shares. An associated

company known as Phoenix Studios Ltd. was subsequently formed in which he held one subscriber's share and no more. Mr. A. W. Robson had no shareholding in either company.

When formed the company set about obtaining the finance necessary to commence business and for this purpose raised a sum of £120,000, £80,000 of which came from a Mr. Riddlesbarger and about £10,000 from Mr. Robson, and it appears that no part of this sum of £120,000 was ever repaid. Mr. Robson's contribution of £10,000 was made out of his own monies and not out of partnership funds and it is not included in the losses with which the appeals are concerned. He received no income in respect of this loan. Shortly afterwards, the company found that additional finance was required and in the year 1956 it applied to the bank in Nairobi which is now known as National and Grindlays Bank Ltd. for an overdraft facility. This was granted on Mr. Robson, at Riddlesbarger's request, signing a personal guarantee to the bank. Although Mr. Robson was the sole guarantor named in the instrument of guarantee and was alone answerable to the bank thereunder, the burden which he undertook was understood as between himself and his two partners, Mr. A. W. Robson and Mr. Harris, to be a partnership liability of the firm. The overdraft was granted to the company by the bank on the basis of it being a temporary loan and of Riddlesbarger having agreed to put up further money to enable it to be discharged, and Mr. Robson at that time had no reason to believe that occasion would arise for him to be called upon by the bank to meet his liability under the guarantee.

In addition to negotiating the overdraft from the bank Mr. Robson approached a number of clients of the firm and from them obtained further financial assistance for the company in the form of loans which were granted on the strength of Mr. Robson's assurances that he would see that they were repaid, and certain of these loans were secured by promissory notes given by Mr. Robson and by Mr. Harris. The monies so raised were paid through the firm to the company or its creditors including a number of employees whose wages were outstanding.

The company went into production and succeeded in producing in all three feature films from the distribution of which it expected to receive regular payments. Unfortunately the sums received proved to be less than had been anticipated and, after a time, the company went into liquidation as a result of a petition presented on the ground of it being just and equitable that it should be wound up. Ultimately a dividend of Shs. 14/- in the £ was paid to the creditors and Mr. Robson or his firm was called upon to pay and did pay the resulting shortfall to those persons who, as a result of his approaches to them, had lent money to the company. None of the loans raised by the company was applied in paying anything due to the firm.

The sums which are sought to be deducted for tax purposes have been written off in the profit and loss accounts of the firm and are as follows:

(i) For the year ended April 30, 1962:	£4,858.11/-
(ii) For the year ended April 30, 1963:	£1,910.00
(iii) For the year ended April 30, 1964:	£1,460.00
Total:	<u>£8,228.11/-</u>

The breakdown of this sum of £8,228.11/- is as follows, the amounts shown representing payments made by the firm to the respective creditors:

(a) National and Grindlays Bank Ltd., being the balance due by the
company in respect of its overdraft: £1,320.15/-

- (b) Mrs. Wiggins, in respect of moneys due to her on the purchase of land for the purposes of the company by its associate Phoenix Studios Ltd. and for which Mr. Robson had given a guarantee: £2,950.00
- (c) Four other creditors of the company each of whom had an enforceable claim against the firm for moneys lent to the company: £3,957.16/-

Mr. Robson's connection with the company may be said to have been fourfold. His loan of £10,000 was a contribution to the initially agreed working capital of £120,000 and, although not carrying interest, it entitled him by arrangement to a two-twentieths share of so much of the ultimate profits (if any) as was not payable to Riddlesbarger, the principal promoter. In this respect he was clearly an investor and had he received any income or share of profits from this source (which was not the case) he would no doubt have been taxable thereon quite apart from any liability to tax which arose from his practice as an advocate. Conversely, having lost his investment of £10,000 he is not entitled, nor does he seek, to claim a deduction for tax purposes on that account.

Secondly, he was appointed at some stage the "executive producer" of the company without remuneration. The court was not told what duties or functions attached to this appointment nor was it suggested that it was in any way connected with the losses with which we are dealing, and since it yielded no income this particular relationship with the company, which appears to have been entirely honorary, need not be further considered.

Thirdly, he was at all material times a director of the company and it is necessary to examine his position in this regard. I am satisfied, both from the evidence given here to which I will refer later and as a matter of common knowledge among members of the legal profession in Nairobi, that it is a custom frequently adopted in Nairobi for an advocate, who is acting for promoters forming a limited liability company, to be invited by his clients to take a seat on the board of the company when incorporated, acquiring no greater shareholding than such (if any) as may be necessary to qualify him to take his seat, on the understanding that he will attend meetings of the board and generally be available to place his knowledge, advice and experience, both as a lawyer and man of affairs, at the disposal of the company. He has told us that it was in this way that he became a member of the board of Phoenix Productions Ltd. and this is not challenged. In practice, the remuneration of an advocate director in respect of the services so given is a matter for arrangement and may take the form of a director's fees or of professional charges for "attendances" as prescribed by the appropriate scale under the Advocates Act (Cap. 16), or otherwise. Again, I am satisfied, both from the evidence given and as a matter of common knowledge among members of the profession in Nairobi, that it is not unusual for a commercial bank operating in that city, if approached for an overdraft facility by a company incorporated with limited liability, particularly if the company be not long established, to require and obtain, as a measure of security before granting the facility, a collateral guarantee or indemnity by one or more of the directors or by a third party.

Lastly, Mr. Robson was a member of the firm of advocates which acted for the promoters in forming the company and for the company itself after incorporation and he was clearly the partner in that firm most closely identified with the affairs of the company.

Consideration must at this point be given to the manner in which he and the firm were remunerated for their services to the company. This remuneration had three potential sources, namely, (a) professional legal fees for specific work such as the formation of the company and conveyancing; (b) a charge of

£1,000 for each feature film completed by the company, which was intended to cover day to day legal advice and all other work done either in the firm's office or by Mr. Robson at board meetings; and (c) a percentage fixed at three and a half per cent. of the gross profits of the company, which was intended to cover all his work for and about the business of the company done outside the firm's premises and the company's boardroom and therefore not comprised in the work in the second category.

The first of these sources does not call for comment. The second, namely, the flat charge of £1,000 for each film, if paid in full, would have yielded a total sum of £3,000 in respect of the three films actually produced but in fact was met only to the extent of the dividend of Shs. 14/- in the £ ultimately paid to the firm by the Official Receiver as liquidator of the company. It was not clear from the evidence whether the third source, namely, the remuneration to be based on a percentage of the gross profits, produced any income, but I am satisfied that, if it did, this money, as well as everything received from the two other sources, was brought into account as part of the income of the firm and was in turn attributed proportionately to each of the appellants and so dealt with for tax purposes. No remuneration of any sort was derived from either the loan of £10,000 made by Mr. Robson personally or any of the guarantees given to secure the overdraft or other loans to the company, nor did Mr. Robson receive any remuneration, fees or dividends as a director of or shareholder in the company.

In view of the respondent's contention that the provision of remuneration from the second and third sources mentioned above should be regarded as evidence that Mr. Robson's relationship with the company insofar as it was productive of that remuneration was in essence that of an investor rather than, or in addition to and distinct from, that of an advocate, and that the losses borne by him and his partners should be treated as capital losses not deductible, it is necessary to look somewhat more closely at that relationship. In his testimony Mr. Robson stated that he had had what he described as "a very full solicitor and client relationship" with the company, but nothing more other than that of having lent to the company without interest the initial sum of £10,000 (none of which was ever repaid) and of being the holder of the honorary post of "executive producer". He said that he was aware of his own knowledge that other advocates from time to time give guarantees on behalf of clients, and that he himself had previously had occasion to do the same but was only once called upon to honour such a guarantee and that for only a small sum. He said that it had been a common practice in his firm in the past to give guarantees with considerable potential liabilities although in recent times it had not done so to a large extent but he agreed that it is unusual for an advocate to be remunerated for his work for a limited company by means of a percentage on its gross profits.

Evidence as to the practice among advocates in Nairobi in regard to these matters was given also by three other members of the Bar unconnected with the appellants' firm, each of whom has been practising there for upwards of sixteen years, as to what they believed to be customary in that city among advocates engaged in this type of business, and it is necessary to consider their testimony in some detail. Mr. Wilcock, who was called on behalf of the appellants, expressed the view that it is common practice for advocates to be invited to join the boards of directors of limited companies and to accept such invitations, the purpose being to enable their advice to be readily available at board meetings. He himself is a director of some twelve such companies, in the majority of which he has no shareholding. He is remunerated by the payment of a director's fees and his practice is that where he has been asked to become

a director by reason of his being an advocate all such fees are treated as belonging to the firm in which he is a partner. He said that where a private company seeks an overdraft facility from a bank the latter normally requires the overdraft to be secured by a personal guarantee from one or more of the directors, that he himself as a director has given such guarantees and the practice is perfectly proper. In addition, he frequently has had occasion to guarantee the payment of purchase moneys in the course of his conveyancing work. He has never been remunerated for his professional services to a company by means of a percentage of the profits of the company.

Mr. Sirley, who was likewise called on behalf of the appellants, agreed that it was common practice for advocates to become directors of companies and to give personal guarantees on their behalf, adding that he himself is a director of some thirty-five or forty companies, all clients of his firm, and that he has frequently guaranteed payment of a company's debts but always in connection with his practice as an advocate and in one instance up to a sum exceeding £1,000,000. He stated that his remuneration as an advocate in company work is usually based upon a fixed yearly retainer, together with fees for litigation and conveyancing, and that his remuneration for the giving of guarantees on behalf of a company is usually computed as a percentage of its profits.

Mr. Thomson, who was called on behalf of the respondent and is a former president of the Law Society of Kenya, said that when he accepts a directorship by virtue of which he will be expected to give legal advice to the company at board meetings his remuneration for giving such advice always takes the form of a director's fees which in turn he brings into the profits of the firm of advocates in which he is a partner. He frequently gives binding undertakings for the payment of outstanding purchase moneys and stamp duties in conveyancing matters and once as a director guaranteed an overdraft granted to a company, but while he is aware that there are advocates who guarantee loans to their clients, his firm does not do so and in his experience it is not the general practice. He said that if, having accepted a directorship offered to him by reason of his being an advocate, he were to be asked for a guarantee on behalf of the company he would decline to give it but he agreed that there would be nothing improper in acceding to the request, especially if his partners consented, and that they could quite properly authorize him to sign such a guarantee for which they would share the liability with him. He added that he knew that this course is followed by some firms of advocates other than his own but was not aware how general the practice might be.

On these facts the question at issue is whether the losses incurred by the appellants under the circumstances mentioned are proper to be deducted under the provisions of s. 14 (1) of the Act of 1958 and are not precluded from being so deducted by the provisions of s. 15. Section 14 (1) provides that for the purpose of ascertaining the total income of any person for any year of income there shall be deducted all expenditure incurred in such year of income which is expenditure wholly and exclusively incurred by him in the production of such income and which is not expenditure in respect of which, by reason of s. 15, such a deduction cannot be allowed. Section 15, so far as material, provides that no such deduction shall be allowed in respect of either (a) any expenditure or loss which is not wholly and exclusively incurred by such person in the production of the income or (b) any capital expenditure. In the United Kingdom the corresponding restriction under s. 137 of the Income Tax Act 1952, takes the form of a prohibition upon deduction in respect of any disbursements or expenses not being money wholly and exclusively laid out or expended for the purpose of the trade, profession, employment, or vocation of the taxpayer.

The appellants contend that the issue is precisely covered by the decision of Pennycuik, J. in the

Chancery Division of the High Court of Justice in

England in *Jennings v. Barfield and Barfield*, [1962] 2 All E.R. 957; [1962] 1 W.L.R. 997, and more generally by that of the Court of Appeal in England in *Morley v. Lawford & Co.* (1928), 14 Tax Cas. 229; while the respondent relies upon views expressed in the House of Lords in *Hagart and Burn-Murdoch v. Commissioners of Inland Revenue*, [1929] A.C. 386, to which I will refer for brevity as *Hagart's* case. Counsel on each side were agreed that the material provisions of the United Kingdom legislation are sufficiently similar to those of the East African Income Tax (Management) Act 1958, to allow of the court approaching the problem before it in the light of the law as considered in those three cases. No reported East African decision was referred to.

The most authoritative of these three decisions is that in *Hagart's* case where the House of Lords unanimously upheld the decision, itself unanimous, of the First Division of the Court of Session in Scotland disallowing a claim by a firm of writers to the signet in which they sought to deduct for tax purposes sums totalling £2,615 which had been lent by the firm without security to a company which at the time was a client of the firm and which monies had not been repaid. The company had been formed by some other clients of the firm, the legal business relating to its incorporation having been performed by the firm, and its purpose was to carry out certain experiments in the production of a metal alloy with the intention that, if the experiments should prove successful, a large public company would be promoted for the marketing of the metal. This in turn would probably have led to a substantial increase of professional work for the firm. The experiments, however, proved unsuccessful, the company failed, and the loan became irrecoverable. The firm as such was not a shareholder in the company but one of the partners held a £1 share to qualify him for a seat on the board and another partner held 250 shares of £1 each as an investment. The sole relationship between the firm and the company was described as being that of “solicitor and client” and it was proved to the satisfaction of the Commissioners or admitted that the firm had been in the habit of making advances to other clients when required and without security.

Counsel for the respondent, relying strongly upon *Hagart's* case (*supra*), submitted, first, that insofar as the appellants' claim related to losses incurred through Mr. Robson having given undertakings to the bank or others, the giving of an undertaking to cover a certain sum of money was “as good as” lending that sum and therefore that the transactions in question constituted a form of money-lending. This submission was not supported by authority and is, in my opinion, incapable of justification in the present context. I am satisfied on the evidence to which I have already referred, and indeed it is a matter of common knowledge to every person who has practised at the Bar in this country, that in a variety of circumstances ranging from the conducting of a purchase of property by a client to the bespeaking of documents from the court, an advocate is required as a matter of every-day occurrence to give on behalf of his clients undertakings regarding the payment of moneys binding on him personally. The suggestion that this constitutes a form of money-lending is, in my opinion, quite unrealistic.

Counsel for the respondent further contended that the true position here is that Mr. Robson had been carrying on what counsel described as “a mixture of investment and legal work”, maintaining that Mr. Robson had in effect invested a lot of money in the company and had obtained investments for the company from other sources, thereby accepting a very great risk, and that portion of his remuneration was in the nature of a financial reward related to that work. He submitted also that the arrangement whereby Mr. Robson was to be remunerated in part by the payment of a percentage on the gross profits of the company was quite inconsistent with the proposition that the work being done was purely that of an advocate. I am unable to agree with these arguments. Although

both remuneration by way of a fixed fee of £1,000 for each feature film produced by the company and remuneration by way of a percentage of three and a half per centum upon the gross profits of the company, each being intended to cover the respective categories of work which I have described, may well be unusual, none of the witnesses suggested that either of these methods of remuneration was improper or unprofessional and each would appear clearly to come within the contemplation of the provisions of the Advocates Act relating to costs. By s. 48 (2) of that Act the Chief Justice is empowered to make orders in the case of non-contentious business prescribing that the remuneration therefore shall be either according to rates of commission or percentage or by gross sums. Similarly these methods of remuneration would seem to be in no way incompatible with the tenor of the Remuneration of Advocates Order 1962, made under the Act, which, in Sched. I, prescribes for advocates rates of commission on an ad valorem basis for negotiating either sales of property or loans to be secured by the mortgaging of property, none of which work would necessarily involve any professional legal knowledge or experience and may lawfully be carried on by persons outside the ranks of the profession altogether. A similar basis has been adopted in fixing the costs properly chargeable by an advocate for the professional work involved in sales and mortgages of property. Furthermore, remuneration by the payment of a percentage of profits is analogous to the specific provision in Sched. V of that Order which, in prescribing the remuneration to be allowed to an advocate for the work involved in the administration of an estate, declares that it may be assessed as a percentage of the estimated capital value of the estate. In view of these considerations I am unable to accept the contention of the respondent that the manner of remuneration of Mr. Robson, agreed between him and the company, was inconsistent with the work covered thereby having fallen properly within the scope of the professional activities of an advocate and that the work in question should therefore be regarded as having been performed in some other capacity.

In addition, it is a matter of common knowledge among members of the profession in Kenya that advocates frequently obtain appointments as commissioners for oaths or as notaries public, the duties of which they perform in their offices and when necessary (as in the case particularly of notarial work) with the aid of their clerical staff, and the financial rewards of which are commonly treated as part of their professional earnings as advocates. It is reasonable, again, to suppose that commission earned by an advocate for negotiating a sale of property or a loan of money, the remuneration for which, as I have mentioned, is expressly provided for by the Advocates Remuneration Order, notwithstanding that the work may lawfully be done also by persons outside the ranks of the legal profession, would normally or frequently be dealt with in the same way.

Arrangements of this nature are, of course, a matter for agreement among the partners of the particular firm and each case must be considered in the light of its own facts, but I am satisfied from the evidence in the present case that an operative agreement had been come to and was observed between Mr. Robson and Mr. A. W. Robson (and very probably also Mr. Harris while he was alive) to the effect that what I will call "company work", involving the usual day-to-day matters of a legal nature, the acceptance of directorships, attendance at board meetings and the many consequential activities following therefrom, together with the giving of indemnities and the underwriting of loans to clients within such limits as the partner concerned might consider expedient, was dealt with on the basis that each partner was entitled to undertake such tasks, that all gross earnings would be brought into the firm's accounts, and that any losses which might be suffered would be treated by the partners as losses of the

firm and borne between them accordingly. I am also satisfied on the evidence that this arrangement was within the ambit of the general overall pattern of practice to be found among those advocates in Nairobi whose range of professional activities includes a considerable volume of company and conveyancing work, into which somewhat special category the appellant's firm manifestly falls. It may well be that such advocates form a comparatively small section of the entire legal profession in this country, but that consideration is irrelevant for it is a matter of common knowledge, of which I am aware and of which I must take judicial notice, that the majority of advocates in Kenya do not practice in Nairobi and that of those who do only a limited number engage in or would be entrusted with the type of heavy and responsible commercial work with which this case is concerned.

In my opinion *Hagart's* case, [1929] A.C. 386, in which the law lords in their speeches confined themselves with a considerable degree of strictness to the facts found by the Commissioners, is distinguishable on its facts from the present case. The payments which were in issue there were sums advanced in cash to a client by way of loan and, as Lord Buckmaster said (*ibid.* at pp. 391 to 393):

"The facts and circumstances in which the loans were made are not analyzed; it is not even stated whether they bore interest or not, and except in one case, where the loan was to purchase sheep, the object of the loan is not disclosed. It must, therefore, be taken that in the present case there was no question of advances being made in the strict and usual course of professional work, as, for example, in making payments to defray expenses in connection with a law suit or the purchase of property . . .

In the present case the findings are confined to the bare statement that the advances were made 'in the course of' the relation of solicitor and client, and that this was in accordance with a habit. This to my mind is insufficient. Lending money to clients may often be done by writers to the signet, but it is no essential and necessary part of their profession, and if a case ever arose in which it could be held that money-lending and the profession had become one and the same business, it would require a special finding of facts to that effect before the position could approach that of the cases quoted. Apart from this, it is also true that as factors of an estate or for special purposes money may be advanced by writers to the signet under such conditions that its loss would be a proper element in determining the balance of profits and gains; but the facts as found here do not establish any of the special conditions necessary to blend these payments with that of the profession in which the appellants were engaged."

Similarly, Lord Warrington of Clyffe in his speech said (*ibid.* at pp. 398 and 399):

"It is not suggested that any part of the advances making up the £2,615 consisted of disbursements made in the course of the legal business transacted by the appellants for the company, and nothing that I say must be treated as throwing any doubt on the right of solicitors to a deduction in respect of such disbursements not recovered from the client on whose behalf they were made . . .

The profession in respect of which the balance of profits and gains were to be assessed was that of writers to the signet. The finding of the Commissioners merely amounts to this, that these gentlemen had from time to time been willing under circumstances of which no particulars are given to oblige clients in need of money by making temporary advances. No doubt in so doing they were probably actuated by the feeling that it was good

policy to keep on good terms with their clients and that to refuse to make advances of money might entail a loss of business, but I cannot think that on these findings there is any ground shown for holding that the advances in question were made for the purposes of the appellants' profession of writers to the signet. I cannot hold that the business of money-lending was so far part of the profession of these gentlemen, as carried on by them, as to be one of the purposes thereof, and I should much regret on grounds of public interest if I were compelled so to hold."

The transactions with which we are here concerned were not in any real sense loans by the firm or its partners but, as I see it, were payments made in the discharge of liabilities of the firm or of Mr. Robson to the bank and other persons by reason of undertakings given or obligations incurred in the ordinary course of his activities as an advocate engaged as a member of the firm in a busy and extensive commercial practice. He has said, and it was not controverted, that his relationship with the company was what he described as a very full solicitor and client relationship and that the loans made by the creditors to the company (other than the bank overdraft) were effected by being paid direct to the firm and placed in its "client account". This account, as is well-known, is one required by law to be maintained by advocates for the reception of monies held by them on behalf of clients and it has not been suggested that in so dealing with these funds the appellants were acting otherwise than in a perfectly bona fide manner. Apart from the bank guarantee there is no basis for supposing that any of Mr. Robson's obligations to the company's creditors was incurred either as a director or as an investor; on the contrary, I am satisfied that it was purely as an advocate and member of the firm of Robson, Harris & Co. that he accepted such obligations and was understood to accept them.

Possibly in relation to the bank guarantee slightly different considerations apply and it might perhaps be said that the giving of that guarantee was associated with the fact that Mr. Robson was at the material time a director of the company. Nevertheless, it seems to me that, so far as the bank was concerned, the fact of his directorship probably weighed little in comparison with that of his personal credit both as a man of substance and as a member of the firm of advocates of which he was a partner, and there is no suggestion that any of the other directors was asked to sign such a guarantee. Furthermore, his holding office as a director was itself, as we have seen, directly and solely attributable to his being the company's advocate.

Lastly, counsel for the respondent submitted that the sum of £8,228.11/- lost by the appellants represented a capital loss rather than a revenue loss; that where a director of a company, having guaranteed the company's overdraft, has to meet his guarantee the resultant loss to him is not a deductible expense for tax purposes; and that, unlike the case of a partner lending to his partnership firm, a loan to a company is always capital and, if irrecoverable, constitutes a capital loss. Apart from the fact that, as I have already held, the sums in question were not loans to the company by the appellants, an enquiry as to whether, now that they have proved irrecoverable, they constitute a revenue or a capital loss does not provide an apt criterion by which to determine the issue in this case, for, as Lord Shaw of Dunfermline indicated in *Hagart's* case ([1929] A.C. at p. 396), the source of the money out of which the payments were made by the taxpayer has in truth nothing to do with the question as to whether the payments were made wholly and exclusively for the purpose of his trade, profession, employment or vocation, or, as we would say in this country, were made wholly and exclusively in the production of the appellants' income. Lord Buckmaster was of the same opinion, saying (*ibid.* at p. 392) that it is the application of the moneys and not their origin that provides the real criterion.

For these reasons I must hold that the payments in question on these appeals were made by the firm of Robson, Harris & Co. in the discharge of obligations incurred by Mr. Robson acting as the advocate for the company and which he or his firm had become legally bound to discharge and had in fact discharged.

These findings of fact in my opinion distinguish this case from *Hagart's* case and I will now consider the other two decisions to which I was referred. In *Morley v. Lawford & Co.* (1928), 14 Tax Cas. 229, a firm of contractors had become a guarantor up to a fixed limit of any losses that might be sustained by the promoters of an exhibition on the understanding that the firm would be afforded an opportunity to tender for constructional work in connection with the exhibition. Later, upon the promoters suffering a loss, the firm had been required to meet its guarantee in part. Although the Commissioners held that the amount paid under the guarantee was money expended wholly and exclusively for the purpose of the firm's trade or business and was deductible for tax purposes, Rowlatt, J. was of the view that neither the giving of the guarantee nor the discharge of the liability arising under it was capable of being described as a payment for the purposes of the firm's trade within the meaning of Sched. D of the Income Tax Act 1918, and he set aside the finding of the Commissioners. The Court of Appeal, however, unanimously held on the authorities that as a matter of business they could not on the facts say that the payment made lay so far outside the scope and purpose of the business carried on by the firm as to make it impossible for the Commissioners to come to the conclusion at which they had arrived, and it restored the decision of the Commissioners. The case is not on all fours with the present inasmuch as there the guarantee was given expressly for the purpose of enhancing the firm's chances of securing new business, a characteristic which at best can have formed only a very secondary feature of the present case, but the case lends support to the appellants' argument.

Jennings v. Barfield and Barfield, [1962] 2 All E.R. 957, which is of no binding authority in this country but upon which the appellants relied, bears a somewhat striking resemblance in its facts to the present case. There a firm of solicitors guaranteed at the instance of a bank an overdraft granted by it to a client of the firm for the dual purpose of enabling him to complete the taking of a lease of business premises and to pay a deposit upon a house which he was purchasing, and providing him with funds for carrying on his business. Before the overdraft was paid off the client became unable to meet his commitments and the solicitors were required to make a payment to the bank under the guarantee. Evidence was given that for thirty years it had been the practice of the firm to guarantee loans for clients during such a transaction to assist them until completion, that in one case it had guaranteed the payment of a firm's wages, and that the partner who signed the present guarantee had believed the overdraft to be of a temporary nature and was desirous of retaining the client as a client of the firm. Evidence was given also that it was the practice of some other firms of solicitors to give guarantees or other financial assistance for temporary purposes on behalf of clients well-known to them in connection with transactions in which the firm was acting professionally, including cases where the client was in some temporary difficulty and the firm might feel it a moral duty to assist him. Pennycuik, J., in upholding the finding of the Commissioners in favour of the taxpayer allowing a deduction in respect of the payment made on the guarantee, distinguished *Hagart's* case (*supra*) on the two grounds, first, that there the activity in question was the making of advances rather than the giving of guarantees and, secondly, that in *Jennings'* case there was evidence, not to be found in *Hagart's* case, that at least some other solicitors made a practice of giving guarantees to clients in certain circumstances. In his judgment he said ([1962] 2 All E.R. at p. 966):

“The vital question, it seems to me, is whether the finding of the commissioners . . . – for which there was ample evidence – viz.:

‘That the respondents and some other solicitors are accustomed to give guarantees in favour of clients in certain circumstances, usually when the guarantee is required for what appears a temporary purpose,’

is sufficient to establish that the giving of guarantees in favour of clients is a general or ordinary activity of solicitors in the course of carrying on their practices. Counsel for the Crown contends that the finding is not sufficient to establish that proposition, and I have felt considerable doubt on this point. I have come to the conclusion that the finding is sufficient to establish that it is a general or ordinary activity of the practice of solicitors in the sense of an activity commonly undertaken by solicitors in the course of their practice, though certainly not a practice which is universal or adopted by the majority of solicitors. This is a question of degree on which the court would not readily interfere with the finding of the commissioners, and I think that it would be an unduly narrow view of the law as explained by the House of Lords in *Hagart and Burn-Murdoch v. Inland Revenue Comrs.* to hold that evidence that an activity is carried on by a number of solicitors with no evidence to the contrary is insufficient to establish that that activity is a general or ordinary activity of solicitors.”

As I have already indicated, I am of the opinion that, on the facts as found by me, the decision in *Hagart’s* case (*supra*), upon which counsel for the respondent mainly based his argument, is distinguishable, and I am fortified in this conclusion by the views of Pennycuick, J. in *Jennings’* case (*supra*).

In the result, therefore, and for the reasons which I have endeavoured to express, I hold that the sums in issue in the present case, aggregating £8,228.11/–, are properly deductible under s. 14 (1) of the Act of 1958 and are not precluded from being deductible by s. 15. The appeal in each case will be allowed. I shall now hear counsel as to costs.

Appeals allowed.

For the appellants:

PJ Wilkinson, QC and HP Makhecha
Robson, Harris & Co, Nairobi

For the respondent:

RJ Denney and PG Ferro
Counsel to the East African Community

Dritoo v West Nile District Administration

[1968] 1 EA 428 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	26 June 1968
Case Number:	643/1966 (94/68)
Before:	Fuad J

[1] *Civil Practice and Procedure – Amicus curiae – Whether court can ask Attorney-General to appear in case where State may have an interest – General principles.*

[2] *Civil Practice and Procedure – Pleading – General traverse – Whether general traverse in defence amounts to specific denial of allegations made in plaint.*

[3] *Civil Practice and Procedure – Pleading – Vicarious liability – Plaint alleging wrongful arrest by servant – No allegation that servant acting in course of employment – Whether cause of action disclosed.*

[4] *Damages – False imprisonment and wrongful detention by Administration police – Shs. 14,000/- awarded.*

[5] *False Imprisonment – Arrest by District Administration police without warrant – Whether justified.*

[6] *Police – Arrest without warrant – By Local Administration police – Whether Administration liable – Relationship with Government – Whether Administration policeman is servant of Administration or of Government – Police Act, ss. 3 (5) and (6), 4, 7 (4), 26, 29, 39, 87G, 87H (1); Local Administrations Act, s. 23; Constitution of Uganda, 1966, art. 110; Criminal Procedure Code, s. 85 (U.).*

[7] *Police – Vicarious liability for acts of – Whether Local Administration police are servants of Administration or of Uganda Government – Position discussed.*

Editor's Summary

The plaintiff sued the defendant Administration for damages for wrongful imprisonment and assault. His plaint alleged that he had been wrongfully arrested, detained and assaulted by the defendant's chief of police, Mr. Angila, and other policemen in the employment of the defendant; but it contained no averment that these policemen were acting in the course of their employment by the defendant. The defendant's defence did not specifically deny the facts alleged in the plaint, and merely contained a general traverse. The court found that the plaintiff was arrested and detained without a warrant by Mr. Angila and that the arrest and detention had not been justified; but that the plaintiff's claim for assault had not been made out. The defendant took a preliminary point that the plaint raised no issue between the plaintiff and the defendant because of the lack of an averment that the policemen were acting in the course of employment by the defendant; and the defendant also argued that, in law, the policemen were not servants of the defendant at all. On this latter point the court asked the Attorney-General to appear as amicus curiae, to which both the parties objected on the ground that, if the suit failed against the defendant on this point, the plaintiff would sue the Government and therefore the Attorney-General was an interested party.

Held –

- (i) the plaint disclosed a cause of action (*The Commissioner of Transport v. Gohil* (1) and *Helena Yakobo v. Tanganyika Contractors* (2) applied);
- (ii) (reluctantly) the words of general traverse were a sufficient denial;
- (iii) the court has a wide discretion to ask for the assistance of an amicus curiae if it considers that the interests of justice would be served; and the Solicitor-General should be heard on the grounds that his arguments would assist the court to come to a correct and just decision in a difficult matter;

- (iv) sections 3 (5) and (6) of the Police Act, when read with s. 73 of the Local Administration Act, create the relationship of master and servant between the Administration police and the Administration; and Mr. Angila was at all material times the servant of the defendant Administration acting with the scope of his employment, so that liability was established (*Stanbury's case* (3), *Fisher's case* (4) and the *Perpetual Trustee case* (5) distinguished).

Judgment for the plaintiff for Shs. 14,000/- and costs.

Cases referred to in judgment:

- (1) *The Commissioner of Transport v. Gohil*, [1959] E.A. 936.
- (2) *Helena Yakobo v. Tanganyika Contractors*, [1963] E.A. 261.
- (3) *Stanbury v. Exeter Corporation*, [1905] 2 K.B. 838.
- (4) *Fisher v. Oldham Corporation*, [1930] 2 K.B. 364.
- (5) *Attorney-General for New South Wales v. Perpetual Trustee Co., Ltd. and Others*, [1955] A.C. 457.

Judgment

Fuad J: By this suit the plaintiff sues the West Nile Administration for damages for wrongful imprisonment and assault. Mr. Clerk for the Administration raised a preliminary objection on the pleadings which makes it desirable for me to set out paras. 3 and 4 of the amended plaint:

- “3. On July 6, 1966 the plaintiff was employed by the defendants as a clerk at the Gombolola Headquarters of Adumi Division of Aivu County, and on that day *he was arrested and detained* in the divisional prison there *by the defendants' chief of police, Mr. Adam Angila, and other policemen in the employment of the defendants*, and remained so detained until August 24, 1966, when he was released by the central government police. Altogether the plaintiff was imprisoned for forty-nine days.
4. While so detained the plaintiff *was assaulted by the defendants' servants*, tied to a tree and then badly beaten on several occasions, and the plaintiff suffered much pain and shock, and the plaintiff's body has been permanently deformed in certain parts.”

The substance of Mr. Clerk's submission was that no issues were raised between the plaintiff and the defendant. There was no averment in the plaint that the defendants' servants committed the acts complained of in the course of, or within the scope of, their employment. He further submitted that no master and servant relationship existed between the personnel of a local administration police force and the administration itself, and any amendment that might be allowed would be defective and contradict the provisions of the law, for the alleged torts could not be the subject of vicarious responsibility. I over-ruled Mr. Clerk's objections and now give my reasons. It seems to me that those passages of paras. 3 and 4 of the plaint that I have caused to be emphasised, though they might have been better phrased, are sufficient to found a cause of action against the Administration. I respectfully agree with the judgment of Crawshaw, J. (as he then was) in *The Commissioner of Transport v. T. R. Gohil*, [1959] E.A. 936, where he over-ruled an objection to pleadings that merely stated that the driver was the servant of the defendant, and I do not think it is necessary to set out his reasons. The reasoning of Crawshaw, J. was adopted by Murphy, J. in another Tanganyika case, *Helena Yakobo v. Tanganyika Contractors*, [1963] E.A. 261. I was of the opinion that Mr. Clerk's other point was prematurely raised, and a decision thereon should be

postponed until the final determination of the case, after all the evidence had been heard.

I will deal now for convenience with another matter of law raised on the pleadings by Mr. Kiwanuka, for the plaintiff, in his closing submissions. He submitted that the facts averred in the plaint had not been specifically denied in the defence and they should therefore be taken as admitted under O. 8, r. 3. I agree that the statement of defence is unsatisfactory in some respects but the opening words (which contain a general traverse) seem consistently to be accepted though, it seems, with reluctance, by the courts. I hope Mr. Clerk will, in future, plead more specifically.

Only two witnesses were called, the plaintiff himself, and Mr. Adam Angila who described himself as the Chief of Police of the Administration.

The plaintiff gave evidence that he had been employed as a clerk by the Administration. On July 6, 1966, he was arrested by Mr. Angila and another policeman of the Administration. He was beaten and kept in the office under guard for forty-nine days until he was released on August 29, 1966, after the intervention of the Government police. He was taken to hospital and treated there. He was never at any stage taken before any court. In cross-examination he stated that he knew why he was arrested – it was on suspicion of having lost about Shs. 17,000/–, but he stated he was never in possession of this money, for it was kept by someone else.

Mr. Angila admitted arresting the plaintiff. His evidence was rambling and difficult to follow, but he said first that he had arrested him because he broke a law of the Administration in keeping more money than he was supposed to keep. He detained him for one week. “During that week” he had received an arrest warrant and a search warrant from the magistrate. He had been searching for the cash box in the meantime. During these seven days the plaintiff was detained in his office. He himself transferred the case to the Government police. He said later that he had arrested the plaintiff after he had received an order to investigate the case and make an arrest, an order given to him by the administrative secretary of the Administration. It seems that he was told that the money had been lost by two people, including the plaintiff. He was to go quickly and make investigations about the money and arrest the man responsible. He was not told specifically to arrest the plaintiff. The decision to arrest was entirely his own responsibility, after he had made the necessary investigations.

In cross-examination he stated that he himself had made out a warrant of arrest on July 6, 1966, and the warrant was signed by a magistrate, Mr. Adia; he received the warrant signed by the magistrate at 2.00 p.m. on July 6, 1966, and it was only then that he had arrested the plaintiff. He added that, in fact, he had kept the plaintiff in his custody for nine days, releasing him on July 14, 1966. He further added: “I transferred the plaintiff to the central police on July 16, two days after I had released him.”

It is to be noted that no warrant of arrest was produced before me and in the circumstances I have to take it that on the balance of probabilities no such warrant was issued. It is clear that Mr. Angila arrested the plaintiff in the exercise of his powers under s. 23 of the Criminal Procedure Code, if he knew of them. That section alone would have justified the arrest. He did not take him before a court within twenty-four hours as the law requires, and I am satisfied on the plaintiff’s evidence that he was kept in custody until August 24, 1966, in Mr. Angila’s own office. It is surprising that no other witnesses were called to support Mr. Angila’s testimony, and no court file produced. Such witnesses would not have been difficult to procure had Mr. Angila’s recollection of events been truthful or accurate. It seems to me quite plain that the defendant (if the Administration is the appropriate defendant) has not discharged the onus of justifying the arrest and detention of the plaintiff, and would therefore be liable in damages to him for the whole period of forty-nine days that I find he was unlawfully imprisoned.

With regard to the claim for assault, I find that I have insufficient evidence before me to make any award in the plaintiff's favour. The allegations made by the plaintiff during his evidence are far too vague to be of any weight. He merely said, "They beat me". He did not particularise. He did not say who beat him, or where he was beaten. He did not call any medical evidence although he had said he was taken to hospital. The claim in respect of assault is not made out and is dismissed.

Mr. Clerk raised a novel and interesting point of law in his address to the court. He referred to various provisions of the Police Act (Cap. 312) and of the Local Administrations Act (Cap. 25) which were in force at the material time. He argued that when the plaintiff was arrested Mr. Angila was acting under statutory powers conferred on him and the Police Act provided that he should be controlled in all his actions by persons other than the defendant Administration. Mr. Angila was performing functions that were his own. It was clear, in his submission, that Mr. Angila while performing his duties as a police chief was not a servant of the Administration. The District Administration was required to establish a police force, and having established it the functions of the Administration for assisting the Government in the prevention of crime were no longer exercisable by the officers of the Administration. The mode of exercising his police duties was not subject to any control at all by the Administration. The substance of his argument is contained in 30 Halsbury's Laws (3rd Edn.), p. 700, where it is stated that if the sole duty of a public authority is the appointment of an officer and the duties to be performed by him are of a public nature and have no peculiar local characteristics, the local authority is not responsible for acts of negligence or misfeasance on his part. Mr. Clerk cited to me two cases from which he submitted analogies could be drawn: *Stanbury v. Exeter Corporation*, [1905] 2 K.B. 838, and *Fisher v. Oldham Corporation*, [1930] 2 K.B. 364. *Stanbury's* case involved the liability in negligence of a local authority for the acts of an inspector appointed by them under a certain Act of Parliament, and Willis, J. said ([1905] 2 K.B. at p. 843):

"If the duties to be performed by the officers appointed are of a public nature, and have no peculiar local characteristics, then they are really a branch of the public administration for purposes of general utility and security which affect the whole Kingdom; and if that be the nature of the duties to be performed it does not seem unreasonable that the Corporation should appoint the officer and not be responsible for acts of negligence or misfeasance on his part."

It will be seen that it is on this passage that Mr. Clerk mainly relies. In *Fisher's* case it was held that the defendant Corporation could not be held liable for a wrongful act done by a police constable, for the constable was performing public duties which could not be controlled by the orders of the watch committee; although the police officer was employed by and paid by the Corporation he was not their servant in the full sense of the term.

There is a full review of these authorities and others of Commonwealth Courts in a decision of the Privy Council – *Attorney-General for New South Wales v. Perpetual Trustee Co., Ltd. and Others*, [1955] A.C. 457. That was an action per quod servitium amisit and it failed because the Privy Council agreed that a police constable appointed in New South Wales was a holder of a public office, and his authority was original and not delegated. He exercised it at his own discretion by virtue of his office. His relationship to the plaintiff Government could not, in ordinary parlance, be described as that of servant and master.

The point at issue was so unusual and important that I decided to ask the Attorney-General to appear before me as *amicus curiae*. The Attorney-General accepted the court's invitation and the learned Solicitor-General appeared before

me on June 22, 1968. Before he began to make his submissions Mr. Kiwanuka raised an objection. He argued that the Solicitor-General should not be heard for he could not be said to be disinterested in the outcome of the suit. If the suit failed against the Administration then the plaintiff would presumably sue the Government. Mr. Clerk associated himself with these submissions. I confess I know of no authority on the question when a court is justified in asking for the assistance of an *amicus curiae*. It seems to me that the court has a wide discretion if it considers that the interests of justice would be served. In a sense it can be said that the Attorney-General is always interested that the law should correctly be applied by the courts. I do not think it necessarily follows that if I find the Administration is not the appropriate defendant that the State would be. However, I am content to have rested my decision to hear the Solicitor-General on the simple grounds that I consider his arguments would assist the court to come to a correct and just decision in this difficult matter.

I am much indebted to Mr. Mugerwa for his researches and for placing before me all the relevant and analogous law and authority. Mr. Mugerwa submitted that a police officer was a public officer of a special kind – he was *sui generis*. He was invested with statutory powers and was not subject to the control of the District Administration or of the State in his exercise of those powers. He pointed out that in the United Kingdom special provision was made by the Police Act 1964, so that aggrieved parties could sue the relevant chief officer of police for the torts of his police constables. No express provision obtained here and there was nothing in the Government Proceedings Act (Cap. 69) which would offer any assistance. He submitted that when sub-ss. (5) and (6) of s. 3 of the Police Act were read together with s. 23 of the Local Administrations Act (Cap. 25), which was in force at the material time, it was clear that a sufficient master and servant relationship was established for the Administration to be the appropriate defendant, on the facts of this case. He added that the courts of this country had always given judgment against the State (Attorney-General) when torts were committed by police officers of the Government, and against an Administration where torts were committed by local police officers. It is as if under the “Common Law” of Uganda the position was sufficiently established. This was the effect of Mr. Kiwanuka’s arguments at the hearing of the suit.

I think it is now necessary to refer to various statutory provisions in force in Uganda at the material time. I will first deal with the Police Act. It is to be noted that until the enactment of Ordinance No. 13 of 1962 the Police Ordinance only applied to the Protectorate police force. Now many of its provisions apply to Administration Police Forces. Subsections (5) and (6) of s. 3 of the Act are in the following terms:

- “3. (5) Every administration shall, so soon as the Minister after consultation with the Inspector-General is satisfied that it is expedient to do so, establish within the area of its authority an administration police force to be known by the name of the administration.
- (6) An administration police force shall, subject to the provisions of this Act, operate in the area within the authority of the administration, and its constitution, powers and duties shall be regulated in accordance with the provisions of this Act.”

Section 4 deals with the general duties of the police, and is as follows:

- “4. Subject to the provisions of this Act, every police force shall be employed in and throughout Uganda for the prevention and detection of crime, the apprehension of offenders, the preservation of law and order, the protection of property and the due enforcement of all laws and regulations with which they are directly charged; and as a military force when

called upon, in pursuance of s. 10 of this Act, to discharge such military duties within or without Uganda as may be required of them by or under the authority of the Minister; and for the performance of all such duties shall be entitled to carry arms.”

By virtue of s. 7 (4) of the Act, the Inspector-General may make standing orders (which apply to all police officers) in relation to their enlistment, discharge and training; their arms, clothing and equipment; their places of residence, duties, distribution and inspection; and such other matters as he may deem expedient for preventing neglect and promoting efficiency and discipline. These standing orders are, of course, subject to the provisions of the Act. Section 26 of the Act deals with the general powers and duties of all police officers, as follows:

- “26. (1) Every police officer shall exercise such powers and perform such duties as are by law conferred or imposed on police officers, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from any competent authority.
- (2) Every police officer shall be deemed to be on duty at all times and may, subject to the provisions of this Act, at any time be detailed for duty in any part of Uganda.
- (3) It shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient ground exists; and, for any of the purposes mentioned in this subsection, he may, without a warrant, enter at any hour of the day or night any premises lawfully licensed for the sale of intoxicating liquor or any place in which he has reasonable grounds to suspect that illegal drinking or gambling is taking place or to which dissolute or disorderly characters are resorting.”

Section 29 of the Act makes it lawful for a police officer to institute criminal proceedings before a magistrate and to apply for summonses, warrants and other legal processes. This must be read together with s. 85 of the Criminal Procedure Code, which now applies to all police officers because of the amended definition of “police officer” contained in s. 2 of the Code.

By virtue of s. 39 of the Act the powers of dismissal and disciplinary control of superior police officers are vested in the Appointments Board, acting in consultation with the Inspector-General. Section 87G of the Act is in the following terms:

- “87G. (2) Subject to the provisions of s. 81 of the Constitution, an administration police force shall be commanded by a police officer styled the ‘local commander’.
- (3) Police officers of an administration police force shall have the same powers, duties and responsibilities as those conferred or imposed under the provisions of this Act on police officers generally, and shall exercise all such powers and perform and discharge all such duties and responsibilities concurrently with the officers of the force:

Provided that whenever the officers of any administration police force are required to operate in any area comprising a municipality or government town established under the provisions of the Urban Authorities Act or any other Act, such officers shall operate under the immediate direction and control of the officer in charge of the force in such area.”

It seems clear (as the parties have agreed) that although Mr. Angila referred to himself as the chief of police he was the local commander for the purposes of the Act. His appointment was governed by s. 87H (1) of the Act, but, as Mr. Mugerwa pointed out, those provisions were over-ridden by art. 110 (1) of the 1966 Constitution, which is in the following terms:

- “110. (1) Subject to the provisions of this Constitution power to appoint persons to hold or act in any offices in the public service of the Government of Uganda, the Government of a Kingdom, or the council of a district, including power to confirm appointments, to exercise disciplinary control over persons holding or acting in such offices and to remove such persons from office shall vest in the President acting on the advice of the Public Service Commission.”

Under s. 87J of the Act, the Inspector-General is charged with the duty of inspecting administration police forces.

I think it is also relevant to set out the provisions of sub-ss. (1) and (2) of s. 23 of the Local Administrations Act (then in force) which deal with the duty of Administrations in respect of the prevention of crime:

- “23. (1) It shall be the duty of every administration in co-operation with the Government to the best of its ability to assist in preventing the commission of any offence, to assist in the arrest of any offenders and to assist in the restoration of any property unlawfully obtained.
- (2) In order to carry out its duties under sub-s. (1) of this section an administration may, subject to the provisions of the Police Act, establish a police force which shall have such powers, duties and responsibilities as shall be conferred upon it from time to time by any Act.
- Provided that the Minister may if he is satisfied that it is expedient to do so, direct an administration to establish a police force.”

In *Fisher's* case *McCardie, J.*, made an observation which the Privy Council considered to be “well worth citing”, in the *Perpetual Trustee* case. It is as follows:

“Suppose that a police officer arrested a man for a serious felony. Suppose, too, that the watch committee of the borough at once passed a resolution directing that the felon should be released! Of what value would such a resolution be? Not only would it be the plain duty of the police officer to disregard the resolution, but it would also be the duty of the chief constable to consider whether an information should not at once be laid against the members of the watch committee for a conspiracy to obstruct the course of criminal justice.”

It will be seen at once from what I have set out above that Mr. Clerk's arguments are most attractive. How, it might be said, can a district administration be held responsible for the tortuous acts of a police officer where they have no control over his appointment or dismissal, or, more important, over the way that he performs his duties? Were not Mr. Angila's duties of a public nature without any peculiar local characteristics? Attractive though these submissions were (and I must confess that at first I thought they were unimpeachable) great caution must be exercised before the authorities cited to me can be applied. It must, I think, be remembered, as is pointed out in *Beven on Negligence* (4th Edn.), at p. 415, *Stanbury's* case “turns on a somewhat minute examination of the not plain sections of a long and complicated Act of Parliament” and it is clear that the local law is considerably different. The provisions of English Acts of Parliament and the position of a constable at common law clearly influenced the decision of *McCardie, J.*, in *Fisher's* case. It seems to me,

however, that a great deal turned in that case (as it seems to have done in the *Perpetual Trustee* case) on the form of oath the constables were required to take on assumption of office. It is interesting to note that McCardie, J., quoted with approval an extract from the writings of Professor Simpson:

“Perhaps the administration of the oath to constables by justices of the peace may be fairly considered as characteristics marked of the final subordination of local to central government in rural districts and of the conversion of a local administrative officer into a ministerial officer of the Crown.”

In this context it is important to appreciate that a police officer of a local administration is not required to take an oath or to make a declaration on appointment or enlistment. Part III of the Police Act does not apply to administration police forces, and nothing in the Oaths Act requires such an oath. As I read the authorities, different conclusions might have been reached had oaths not been sworn, converting, as Professor Simpson put it, “a local administrative officer into a ministerial officer of the Crown.”

The learned author of *Salmond on Torts* (14th Edn.) at p. 647, deals with the authorities cited by Mr. Clerk in this way:

“(2) There is authority for saying that if the tort in question is solely the breach of a duty imposed directly upon the servant himself either by common law or statute the master is not vicariously liable for it: he will be liable, it is said, only if he has committed (as he may have) a breach of some duty laid upon him personally, or has intervened in the matter with express orders to the servant. These cases seem to have introduced an unnecessary subtlety and refinement into the law. They seem to be based upon the obsolete and misleading notion that vicarious liability depends upon the existence of the master’s power to control the way in which the work is done; the true theory, however, is that the relationship of master and servant of itself gives rise to the liability and that the right of control is only one factor in determining whether the relationship exists.”

It seems to me, with respect, that *Salmond* places the authorities in the right perspective. Accepting as I do that it is the relationship of master and servant which gives rise to vicarious liability, I have to consider whether the law of Uganda creates that relationship between Mr. Angila and the Administration. I am of the opinion that the provisions of s. 3 (5) and (6) of the Police Act when read with those of s. 23 of the Local Administrations Act have that effect. A local administration must establish a police force “to be known by the name of the administration”. Section 23 of the Local Administrations Act put the matter in another way – the administration is charged with the duty of establishing a police force so that it may carry out its function of assisting the State in the preservation of law and order. It is to be noticed that nowhere in *Fisher’s* case are provisions of an analogous nature cited or relied upon. Mr. Angila, under s. 87G of the Police Act, was the “Local Commander” of the administration police force. Not without some difficulty, then, I have reached the conclusion that Mr. Angila was at all material times the servant of the defendant Administration acting within the scope of his employment, and liability is established. I think that this is the common-sense view, and I am comforted by the thought that my decision is in line with what has always been assumed to be the law obtaining here.

I have now to consider what damages I should award the plaintiff. The assessment of damages in cases such as this is no easy task. The damages must, of course, bear a reasonable relation to the wrong done to the plaintiff. After anxious consideration I do not think that this is a case for exemplary damages; the plaintiff must be compensated for the injury done to him. However, the

court must have both feet firmly on the ground, bearing in mind local considerations. I am satisfied that Mr. Angila acted as he did in sheer ignorance of his powers and duties. Doing the best I can in all the circumstances, I consider that the sum of Shs. 14,000/- would be just compensation for the plaintiff for the wrong done to him.

For the reasons I have given, the claim succeeds in part, and judgment is entered for the plaintiff in the sum of Shs. 14,000/-, with costs.

Before I take leave of this case, I may be permitted to express the view that it might be considered that the time has come for specific legislative provision to be made so that there is no room for argument as to which authority should be sued when such torts as this are committed.

Judgment for the plaintiff accordingly.

For the plaintiff:

Benedicto Kiwanuka

Kiwanuka & Co, Kampala

For the defendant:

AV Clerk

AV Clerk, Kampala

As amicus curiae:

PJN Mugerwa (Solicitor-General, Uganda)

Ajwang v The British India General Insurance Co Ltd [1968] 1 EA 436 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	8 June 1968
Case Number:	346/1967 (95/68)
Before:	Phadke Ag J
Sourced by:	LawAfrica

[1] Insurance – Motor insurance – Third party risks – Compulsory third party insurance – Action by third party injured by car – Car insured for “social, domestic and pleasure purposes” only but being used unlawfully as private hire vehicle at time of accident – Clause in policy excluding liability – Whether valid – Action against insurer – Traffic Act, ss. 98 (1), 99, 102, 104 and 110 (U.).

Editor’s Summary

The plaintiff's husband was killed in a motor accident by the negligence of the driver of a car which was insured with the defendant insurance company. The plaintiff successfully sued the owner and driver of the car and obtained a decree. Her decree not having been satisfied, she brought this suit against the defendant insurance company under s. 104 of the Traffic Act. The defendant sought to avoid liability on the ground that, at the time of the collision, the car was being used in breach of the "Limitations as to Use" contained in the policy in that the car was insured only for use for social, domestic and pleasure purposes excluding use for hire or reward, but was in fact being used as a private hire vehicle for the carriage of fare-paying passengers. It was argued for the defendant, *inter alia*, that this breach rendered the policy ineffective so that it was not a policy "in force" at the material time under s. 98 (1) of the Traffic Act; that the relevant term in the policy was a definition and not a condition within s. 102 of that Act; and that the liability was not a liability covered by the terms of the policy within s. 104 (1) of that Act.

Held – (following the *New Great* case (1))

- (i) the policy of insurance was in force at the material time and the defendant company was not entitled to avoid it;
- (ii) the term in the policy as regards the Limitations as to Use was a condition and not a definition;

- (iii) the condition was rendered ineffective by reason of s. 102 of the Traffic Act;
- (iv) the liability of the defendant company to the plaintiff was a liability covered by the terms of the policy.

Judgment for the plaintiff with costs.

Cases referred to in judgment:

- (1) *New Great Insurance Co. of India Ltd. v. Cross and Another*, [1966] E.A. 90.
- (2) *Hardy v. Motor Insurance Bureau*, [1964] 2 All E.R. 742.
- (3) *McLeod (or Houston) v. Buchanan*, [1940] 2 All E.R. 179.
- (4) *Bright v. Ashfold*, [1932] 2 K.B. 153.
- (5) *Gray v. Blackmore*, [1934] 1 K.B. 95.
- (6) *Wyatt v. Guildhall Insurance Co. Ltd.*, [1937] 1 All E.R. 792.
- (7) *Jones v. Welsh Insurance Corpn. Ltd.*, [1937] 4 All E.R. 149.
- (8) *R. v. Harnam Singh* (1950), 24 K.L.R. 101.
- (9) *Provincial Insurance Co. v. Morgan and Foxon*, [1933] A.C. 240.

Judgment

Phadke Ag J: The plaintiff has instituted this suit under s. 104, Traffic Act (Cap. 342) Laws of Uganda (hereinafter referred to as “The Traffic Act”) to enforce against the defendant company the judgment and decree obtained by her against Hassani Mabonga and Mohamadi Kasiko in High Court Civil Suit No. 10 of 1967. The said decree, dated September 19, 1967 (annexture “B” to the plaint) is for the sum of Shs. 53,995/- with interest thereon at 6 per cent. per annum from that date, and agreed costs of Shs. 10,270/-. The plaintiff prays for a declaration that the defendant company do pay to her the amount payable to her under the said decree and also the costs of this suit.

The undermentioned facts were either admitted in the pleadings or satisfactorily proved by unchallenged evidence:

- (1) The plaintiff is the widow of one Anthony Nambudie (hereinafter referred to as “the deceased”) who died as the result of a motor accident on February 1, 1966;
- (2) On February 1, 1966 the deceased, who was riding his bicycle in the vicinity of mile 1 on Tororo/Jinja road, was in collision with a Peugeot motor vehicle numbered USF. 343, owned by one Hassani Mabonga and driven at the time by one Mohamadi Kasiko. The deceased was injured in the collision and died as the result of the injuries;
- (3) In High Court Civil Suit No. 10 of 1967 the plaintiff claimed damages against the said Hassani Mabonga and Mohamadi Kasiko for causing the death of the deceased, and obtained against them the judgment and decree hereinbefore mentioned;
- (4) The aforesaid Peugeot motor vehicle USF. 343 was registered as and licensed for use as a private car (see evidence of Stanley Kayindu Sengendo);
- (5) Pursuant to the proposal for insurance made by the said Hassani Mabonga in respect of the said motor

vehicle, the defendant company had insured it under its Private Car Policy numbered U/EA/PM/8525/65 (Exhibit 1) for the period December 21, 1965 to December 20, 1966.

The Schedule (PM) in the said Private Car Policy contained the following "Limitations as to Use":

"Use only for social, domestic and pleasure purposes. The policy does not cover use for hire or reward racing pacemaking reliability trial speed testing commercial travelling the carriage of goods in connection

with any trade or business or use for any purpose in connection with the Motor Trade.”

Under s. II – Liability to Third Parties, of the said private car policy, the defendant company undertook to indemnify the insured in the event of accident caused by or arising out of the use of the motor vehicle against all sums including claimant’s costs and expenses which the insured should become legally liable to pay in respect of death of or bodily injury to any person.

Clause 1 (b) (i) under the heading “General Exceptions” stated that “the Company shall not be liable in respect of any accident loss damage or liability caused sustained or incurred whilst the motor vehicle is being used otherwise than in accordance with the Limitations as to Use”;

- (6) At the time of the collision between the deceased and the said motor vehicle, the vehicle was being used as a private hire motor vehicle for the carriage of fare-paying passengers, for which the said Mohamadi Kasiko (the driver) was prosecuted, convicted on his own plea of guilty, and fined in Criminal Case No. MT/137/1966 in the magistrates’ court at Tororo (see evidence of Ebwonu Esolo and Dev Raj Agnihotri). Mr. Nabudere, advocate for the plaintiff, conceded that the vehicle was so used and that such user was unlawful;
- (7) Before the commencement of the aforesaid High Court Civil Suit No. 10 of 1967 the plaintiff gave notice to the defendant company (as insurer of the said motor vehicle) of the bringing of that suit.

The plaintiff gave evidence that she had not been able to recover the amount of the aforesaid decree from Hassani Mabonga and Mohamadi Kasiko or either of them. Her claim against the defendant company is that under s. 104, Traffic Act the defendant company is under a legal liability to satisfy the said decree in her favour.

The defence is that the defendant company is not liable to satisfy the plaintiff’s claim on the ground that at the time of the collision the insured vehicle was being used in breach of the “Limitations as to Use” stipulated in the private car policy and therefore the policy was non-operative and/or ineffective at the material time. Alternatively, the defendant company pleaded that it is not liable on the ground that by reason of the breach the insured had become disentitled to be indemnified.

At the outset it is desirable to set out, at some length, certain relevant provisions of the Traffic Act under the heading “Part IX – Compulsory Insurance of Motor Vehicles”.

Section 98 (1) – “Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of that vehicle by that person or that other person, as the case may be, such a policy of insurance or such security in respect of third party risks as complies with the requirements of this Act”.

Section 99 prescribes the requirements to be complied with, and para. (b) provides that the policy of insurance must be a policy which “insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road”.

Section 102 – “Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects

such liabilities as are required to be covered by a policy under s. 99 of this Act, be of no effect. Provided that nothing in this section shall be taken to render void any provision in a policy requiring the person insured to repay to the insurer any sums which the latter may have become liable to pay under the policy, and which have been applied to the satisfaction of the claims of third parties”.

Section 104 (1) – “If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of s. 99 of this Act, being a liability covered by the terms of the policy, is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments”.

The words “liability covered by the terms of the policy” which appear in the above section are defined in sub-s. (6) as meaning “a liability which is covered by the policy but for the fact the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy”.

Section 110 states – “Where a certificate of insurance has been issued under s. 101 of this Act to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters:

- (a) the age or physical or mental conditions of persons driving the vehicle; or
- (b) the condition of the vehicle; or
- (c) the number of persons that the vehicle carries; or
- (d) the weight or physical characteristics of the goods that the vehicle carries; or
- (e) the times at which or the areas within which the vehicle is used; or
- (f) the horse power or value of the vehicle; or
- (g) the carrying on the vehicle of any particular apparatus; or
- (h) the carrying on the vehicle of any particular means of identification,

shall as respects such liabilities as are required to be covered under para. (b) of s. 99 of this Act, be of no effect.”

The abovementioned provisions of the Traffic Act are identical with certain provisions of the Insurance (Motor Vehicles Third Party Risks) Act enacted in Kenya (hereinafter referred to as “the Kenya Act”) and they also closely follow the English legislation on the subject contained in the Road Traffic Act 1930, and the Road Traffic Act 1934. The table given below shows the comparative position.

<i>Traffic Act</i>	<i>Kenya Act</i>	<i>English Acts</i>
Section 98 (1)	Section 4 (1)	Section 35 (1) – 1930 Act
Section 99 (b)	Section 5 (b)	Section 36 (1) – 1930 Act
Section 102	Section 8	Section 38 – 1930 Act
Section 104	Section 10	Section 10 – 1934 Act
Section 110	Section 16	Section 12 – 1934 Act

The provisions of the Kenya Act referred to above and those of the English Acts were considered and compared in the decision of the Court of Appeal for

Eastern Africa in the *New Great Insurance Co. of India Limited v. Cross and Another*, [1966] E.A. 90, to which I will have occasion to refer later in this judgment.

Mr. Nabudere, advocate for the plaintiff, relied upon the majority decision in the *New Great* case and more particularly upon the judgment of Crabbe, J.A., and the decision of the English Court of Appeal in *Hardy v. Motor Insurance Bureau*, [1964] 2 All E.R. 742, cited therein. He submitted that under the Traffic Act any use of a vehicle was required to be covered by a policy of insurance in respect of liability to a third party and that any limitation in the policy in respect of the use was a condition which was of no effect by virtue of s. 102, Traffic Act. There was a policy of insurance in force as required by law and liability to the plaintiff could not be denied by the defendant company.

Mr. M. A. Patel, advocate for the defendant company, submitted that the words “in force in relation to the user of the vehicle” appearing in s. 98 (1) Traffic Act should be construed to refer to the use permitted under the policy and not to any or every use whatsoever, and where a term of the policy limits the use such term restricts the operation of the policy from its very inception with the result that in the event of a breach the policy is non-operative and ineffective during the continuance of the breach. In this case the permitted use of the vehicle under the policy was for “only social, domestic and pleasure purposes” and use for hire or reward was excluded. Since the vehicle, which was not only licensed but also insured for use as a private car, was admittedly used as a private hire motor vehicle in breach of the relevant term as to user in the policy, the policy had become ineffective and was not a policy which was “in force” at the material time within the meaning of s. 98 (1), Traffic Act (s. 4 (1) Kenya Act and s. 35 (1) English Act, 1930).

In support of his submission, Mr. Patel referred to two English decisions – *McLeod (or Houston) v. Buchanan*, [1940] 2 All E. R. 179, and *Bright v. Ashfold*, [1932] 2 K.B. 153. In both these cases the question for determination was whether a policy which insured against third party risks (as required by s. 35 (1) English Act, 1930) but contained a term limiting the use of the vehicle for a specified purpose could be construed as an effective policy in respect of such risks when the vehicle was used in breach of the limitations as to use. In *McLeod (or Houston) v. Buchanan* it was held that as the owner of the vehicle had permitted its use in breach of the specified limitation he had failed in his statutory duty of insuring against third party risks which might have been incurred at the time of the breach. In *Bright v. Ashfold* it was held that as the insured motor cycle was used for carrying a passenger on a pillion without a side-car being attached, contrary to a term of the policy, there was no policy of insurance in force in respect of third party risks because the term limiting the user was not a condition which was of no effect as respects liability to a third party under s. 38, English Act, 1930 (see s. 102, Traffic Act and s. 8, Kenya Act).

Mr. Patel also referred to other English decisions, namely *Gray v. Blackmore*, [1934] 1 K.B. 95; *Wyatt v. Guildhall Insurance Co. Ltd.*, [1937] 1 All E.R. 792, and *Jones v. Welsh Insurance Corp., Ltd.*, [1937] 4 All E.R. 149, in all of which the insurer was held to be not liable to an injured third party on the ground that at the material time the insured vehicle was being used in breach of the limitations as to use specified in the insurance policy.

The abovementioned English decisions appear to support Mr. Patel’s submission but that, as I see it, is not the end of the matter. In the *New Great* case, [1966] E.A. 90, the Court of Appeal for Eastern Africa whose judgment, if applicable, is binding upon me, had occasion to consider the interpretation of s. 8, Kenya Act (s. 102, Traffic Act and s. 38, English Act, 1930). In that case the insurer had denied liability to satisfy the judgment obtained by injured third

parties against the insured on the ground that at the material time the insured vehicle had been driven by a person disqualified from holding a driving licence and that such driving was in breach of a term of the policy which excluded driving by a person so disqualified under a proviso in the Schedule in the policy pertaining to “authorised driver”. The High Court of Kenya had entered judgment against the insurer in favour of the injured third parties and the insurer had appealed against that judgment to the Court of Appeal. Newbold, V.-P. (as he then was), who presided at the appeal, was of the opinion, for reasons which I will not here repeat or paraphrase, that s. 8, Kenya Act, should be given a wider interpretation than that given to s. 38 of the English Act, 1930, in the English decisions. He approved of the decision of the Supreme Court of Kenya in *R. v. Harnam Singh* (1950), 24 K.L.R. 101, and held that the English decisions in *Bright v. Ashfold* and *Gray v. Blackmore* (*supra*) are bad law and should not be followed in East Africa. De Lestang, J.A. (as he then was) expressed a contrary opinion. He preferred a narrow interpretation of s. 8, Kenya Act, similar to the interpretation given to s. 38, English Act, 1930 in the English decisions. He referred with approval to *Bright v. Ashfold*, *Gray v. Blackmore* and *Wyatt v. Guildhall Insurance Co. Ltd.* (*supra*). Crabbe, J.A., whilst he concurred with Newbold, V.-P., in dismissing the appeal, did not specifically express any opinion on the interpretation of s. 8, Kenya Act. This difference of judicial opinion between Newbold, V.-P., and De Lestang, J.A., on the interpretation of s. 8, Kenya Act (which is identical with s. 102, Traffic Act) and the absence of any specific pronouncement thereon by Crabbe, J.A., raises for me the difficult question of deciding whether or not the opinion of Newbold, V.-P., is binding upon me by reason of the fact that his conclusion in dismissing the appeal was concurred in by Crabbe, J.A. However, there is one observation in the judgment of Crabbe, J.A., which is helpful in guiding me in the matter. He states ([1966] E.A. at p. 103):

“The restrictions which the insurers purported to put on the class of persons who should drive the car could not, in my opinion, exclude the respondent’s independent rights under s. 10 to recover.”

I am inclined to construe this general observation as an expression of agreement with the opinion of Newbold, V.-P., upon the interpretation of s. 8, Kenya Act, and therefore I hold that I am bound by this interpretation of the majority of the court. In the result, I hold against Mr. Patel’s submission that the policy of insurance (exhibit 1) in this case was not in force and therefore non-operative and ineffective at the material time.

The next question which I have to determine is whether or not the term in the policy as regards the Limitations as to Use was a “condition” of the policy within the meaning of that word in s. 102, Traffic Act. Mr. Patel submitted that the term was a definition and not a condition. A similar argument was advanced in the *New Great* case where it was urged that the proviso excluding from the “authorised driver” any disqualified person was not a condition but a definition limiting the type of person who could be an authorised driver. Mr. Patel drew my attention to an observation of Newbold, V.-P., in this connection where the learned Vice President is reported as saying, (*ibid.*, at p. 97):

“Whilst in other circumstances a proviso may have such an effect . . .”

In insurance law no distinction is made between a condition and a warranty as in most branches of the law of contract. In *Provincial Insurance Co. v. Morgan and Foxon*, [1933] A.C. 240, Lord Wright observed that the words “warranty” and “condition” are used as equivalent in insurance law. Therefore some difficulty is bound to arise in determining whether a particular term in a policy of insurance is fundamental or not. As no particular form of words has any special significance, reliance must be placed on the general principles of interpretation.

In my opinion, the best test to apply in the circumstances of this case would be to examine the policy of insurance as a whole in an attempt to ascertain the intention of the parties. The statement in the Schedule regarding the limitations as to use has to be read in conjunction with cl. 1 (b) (i) of the general exceptions (both of which are quoted in an earlier part of this judgment), and although the statement in the Schedule gives at first glance the impression of being a descriptive or collateral term, such impression is dispelled on looking at condition 10 under the heading “Conditions”. This condition states:

“The due observance and fulfilment of the terms of this policy in so far as they relate to anything to be done or not to be done by the insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this policy.”

A condition precedent is a term which goes to the root of the contract and therefore a fundamental term thereof. For these reasons, I do not agree with Mr. Patel’s submission and I hold that the term in question was a “condition” within the meaning of that word in s. 102, Traffic Act.

Mr. Patel also referred to the words “being a liability covered by the terms of the policy” appearing in s. 104, Traffic Act (s. 10, Kenya Act, and s. 10, English Act, 1934). He submitted that the plaintiff, in order to succeed, must establish that not only was the liability required to be covered but was also in fact covered by the policy. He referred to the observation by Newbold, V.-P., in the *New Great* case ([1966] E.A. p. 99):

“I accept that this section applies where both the liability is required under s. 5 (b) to be covered by a policy and the liability is in fact covered by the terms of the policy or would be so covered were it not for the fact that according to the terms of the policy the insurer is entitled to avoid it. A liability may be required under s. 5 (b) to be covered by a policy and yet the liability may not in fact be covered by the particular policy. An example of this is where a policy is taken out relating to the use of the vehicle by the insured only but in fact the vehicle is used by another person.”

The meaning of the words “liability covered by the terms of the policy” is given in s. 104 (6) as “liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy”. In this case, the liability to the plaintiff was required to be covered under s. 99 (b), Traffic Act, and such liability was in fact covered under the policy, and I have held above that the defendant company cannot avoid the policy on the ground that there never was a contract of insurance in existence as the policy was not in force at the material time. I hold, therefore, that the plaintiff has established her claim against the defendant company under s. 104, Traffic Act.

To sum up, I hold as under:

- (a) The policy of insurance was in force at the material time and the defendant company was not entitled to avoid it;
- (b) The term in the policy as regards the limitations as to use was a condition, and not a definition;
- (c) The condition was rendered ineffective by reason of s. 102, Traffic Act;
- (d) The liability of the defendant company to the plaintiff was a liability covered by the terms of the policy.

For the reasons given above, I enter judgment for the plaintiff, against the defendant company for:

- (i) Shs. 53,997/- being the principal amount of the decree obtained by her in High Court Civil Suit No. 10 of 1967, together with interest thereon at six per cent. per annum from September 19, 1967 to the date of payment, and Shs. 10,270/- being the costs of the said civil suit; and
- (ii) The taxed costs of this suit.

Judgment for the plaintiff.

For the plaintiff:

DW Nabudere

DW Nabudere, Mbale

For the defendant:

MA Patel and HQ Ganatra

Patel & Shah, Kampala

Express Transport Co Ltd v BAT Tanzania Ltd
[1968] 1 EA 443 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	3 July 1968
Case Number:	12/1968 (101/68)
Before:	Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Georges, C.J

[1] *Carriage by road – Common carrier – Insufficient packing of goods – Effect on liability of carrier for damage to goods.*

[2] *Carriage by road – Common carrier – Who is – Law of Contract Ordinance, s. 103, (T.) – Measure of damages against.*

[3] *Carriage by road – Common carrier – Limitation of liability – Whether carrier can limit his common law liability – English Carriers Act 1830 and Carriers Amendment Act 1865 – Limitation can only be by contract.*

[4] *Contract – Exemption clause – Carriage of goods – Small print on letterheads and term on printed form “All goods at owner’s risk” – Whether carrier’s liability for negligent handling of goods excluded.*

[5] *Contract – Implied term – Whether term excluding liability for negligent handling should be implied from course of dealing between parties.*

[6] Damages – Measure of – Loss of article by negligence – Market value plus consequential loss recoverable.

[7] Damages – Measure of – Against common carrier for negligent damage to goods – Whether amount of damages should be reduced if damage contributed to by insufficient packing.

[8] Negligence – Contributory negligence – Whether doctrine extends to case where amount of damage but not cause of damage contributed to by negligence of claimant.

Editor's Summary

The appellants, Express Transport, had a transport business and had on a number of occasions transported machinery for the respondent, B.A.T. Express Transport agreed to transport certain machinery, including an AMF Packer machine, from Dar-es-Salaam to Nairobi. The machinery was to be insured by B.A.T. and Express Transport had on its note-paper a statement, "All goods at owner's risk", and this statement also appeared on a form known as a "Driver's

Instruction Briefing Form” which was presented to B.A.T. at the end of previous journeys. The judge below found that this statement was never brought to the attention of any responsible official of B.A.T. The AMF Packer machine was duly loaded onto a lorry but subsequently had to be reloaded by Express Transport and in the course of being reloaded it was negligently dropped. The machine, which was uncreated, was damaged beyond repair. B.A.T. sued Express Transport for the value of a new replacement machine as damages. B.A.T. succeeded in the High Court, where the Chief Justice held (see [1968] E.A. 171) that Express Transport was a common carrier and that there was no term in the contract of carriage limiting liability; but found that, although the accident was caused solely by the negligence of Express Transport, the damage to the machine had been caused as to one-third by the contributory negligence of B.A.T. in not packing the machine sufficiently. Express Transport appealed; and B.A.T. cross-appealed.

Held –

- (i) the evidence showed that Express Transport was a common carrier;
- (ii) In Tanganyika a common carrier can limit his common law liability, as modified by the Carriers Acts, by a special contract; but there was in fact no clause in the contract limiting the liability of Express Transport, and no such term should be implied in the circumstances;
- (iii) (obiter) as Express Transport was a common carrier with a liability wider than one based solely on negligence, any clause excluding liability would be construed as relating only to that liability which would arise without negligence, unless it was quite clear that liability for negligence was also excluded; the words “owner’s risk” would in the case of a common carrier be construed as excluding liability which arises irrespective of negligence and would give no exemption from liability based on negligence;
- (iv) if damage to goods carried by him is caused by the negligence of a common carrier, then, whether or not the goods are insufficiently packed, the common carrier is liable for all the foreseeable damage flowing directly from his negligent act (*Silver v. Ocean Steamship Co.* (15) applied); and as Express Transport negligently dropped the machine, which would not otherwise have been damaged, Express Transport must reimburse B.A.T. for the loss of the machine irrespective of any question of insufficient packing and the damages should not, therefore, be reduced;
- (v) where an article has been destroyed by negligence, the owner of that article is entitled to recover from the person who negligently caused the destruction the market value of the article immediately before its destruction, together with any consequential loss following on the destruction of the article which is not too remote; therefore B.A.T. could not recover the value of a new machine but only the market value of the machine lost.

Observations as to when the courts will imply a term excluding liability for negligence into a contract.

Appeal dismissed. Cross-appeal allowed. Judgment of court below varied.

Cases referred to in judgment:

- (1) *Khimji v. Tanga Mombassa Transport Co. Ltd.*, [1962] E.A. 419.
- (2) *Lakamshi Govindji & Co. v. Hasham Suleman Ltd.*, [1960] E.A. 40.
- (3) *Besson v. Esaji Allibhoy* (1906 – 08), 2 L.R.E.A. 8.

- (4) *British Trading Co. v. Uganda* (1910), 2 U.L.R. 1.
- (5) *Crouch v. London and North Western Railway Co.* (1854), 14 C.B. 255; 139 E.R. 105.
- (6) *Nugent v. Smith* (1876), 1 C.P.D. 423; 45 L.J.Q.B. 697.
- (7) *Peek v. North Staffordshire Railway Co.* (1863), 10 H.L. Cas. 473; 11 E.R. 1109.

- (8) *Belfast Ropework Co. v. Bushell*, [1918] 1 K.B. 210.
- (9) *Date and Cocke v. Sheldon & Co.* (1921), 7 L.I.L. Rep. 53.
- (10) *Lister v. Lancashire Railway Co.*, [1903] 1 K.B. 878.
- (11) *Gould v. South Eastern Railway Co.*, [1920] 2 K.B. 186.
- (12) *Kanti v. British Traders Insurance Co. Ltd.*, [1965] E.A. 108.
- (13) *Omer v. Prudential Assurance*, [1966] E.A. 79.
- (14) *McCutcheon v. MacBrayne Ltd.*, [1964] 1 All E.R. 430.
- (15) *Silver v. Ocean Steamship Co.*, [1930] 1 K.B. 416.
- (16) *Higginbotham v. Great Northern Railway Co.* (1861), 2 F. & F. 796; 175 E.R. 1289.

July 3, 1968. The following considered judgments were read:

Judgment

Sir Charles Newbold P: This is an appeal by two defendant transport companies against a decision of the Chief Justice awarding to one of two plaintiff tobacco companies damages for loss resulting from the destruction of a machine caused by negligence for which the two transport companies were held responsible. Although the second plaintiff tobacco company is named in the appeal proceedings, the decision of the Chief Justice in relation to this company is not challenged and, accordingly, it should be regarded as not in any way involved in this appeal. The two transport companies which have appealed are closely inter-connected and can, for the purposes of this appeal, be regarded as one company. I shall accordingly refer to the two appellant transport companies as Express Transport and to the respondent tobacco company as B.A.T.

The contract of carriage was made in Kenya, but the damage was negligently caused in Tanzania. It is not, however, suggested that there is any difference in the laws of these two States relevant to the matters under appeal, thus there is no necessity to decide which law applies. I shall refer in my judgment, as was done during the appeal, to Tanzanian statutes.

Express Transport is a company which, *inter alia*, undertakes transport business throughout East Africa and which had, on a number of previous occasions, transported machinery for B.A.T. Towards the end of November, 1965, it was agreed between B.A.T. and Express Transport that the latter would transport certain machinery from Nairobi to Dar-es-Salaam and then transport certain other machinery from Dar-es-Salaam to Nairobi. The matter was first discussed, as was in accord with past practice, on the telephone between Mr. Shiel, on behalf of B.A.T., and Mr. Reuben, on behalf of Express Transport. The details and price were later agreed, again on the telephone, between Mrs. McLoughlin for B.A.T. and Mr. Jansen for Express Transport. In the course of that telephone conversation Mr. Jansen specifically stated that the price did not include a premium for insurance and Mrs. McLoughlin stated that B.A.T. would make its own insurance arrangements. The notepaper of Express Transport for some time had, as part of its format, the following statements: "All goods at owner's risk" and "No liability whatsoever is accepted by the company for goods stored or handled". As correspondence had taken place in respect of previous dealings with Mr. Shiel, he had had an opportunity to notice these statements, though Mr. Shiel said, and the Chief Justice accepted his statement, that he never paid attention to them.

In accordance with the usual practice, the driver of the lorry used to transport the machinery was given a form headed "Driver's Instructions – Briefing Form". On the form, in capital letters, appeared the words: "All goods carried at owner's risk". This form was mainly used for the internal purposes of Express Transport, but the driver's instructions were to produce the form for the purposes of identification at the start of a journey of transport and then to obtain from the person to whom the load was delivered a signature before the driver was released.

An employee of B.A.T., who had no authority in respect of transport contracts, said that he had frequently in the past signed such a form as acknowledging receipt of the goods mentioned therein but that otherwise the form was instructions for the driver.

Express Transport safely carried the machinery from Nairobi to Dar-es-Salaam. On December 3, 1965, B.A.T. loaded on the lorry a heavy Packer Machine with a view to it being transported to Nairobi. This machine was not crated but was bolted to a platform. The machine was made of cast-iron and was liable to serious damage should it receive a shock from being dropped. The lorry set off from the B.A.T. factory at which it was loaded to the premises of Express Transport in Dar-es-Salaam where the driver complained that the lorry was not steering satisfactorily due to bad loading. Express Transport then telephoned B.A.T. and obtained permission to adjust the load on payment of an additional charge. In making the adjustment Express Transport negligently dropped the machine with the result that for all practical purposes it was completely destroyed. It was usual, though by no means invariable, for machines of that nature to be transported uncrated but bolted to a platform as was done in the case of this Packer Machine. An expert assessor stated, and the Chief Justice accepted his evidence, that had the machine been crated a considerable amount of the damage would have been avoided and the machine probably would not have been destroyed. B.A.T. brought a suit against Express Transport claiming damages on the grounds, first, that Express Transport had failed in its duty as a common carrier to carry the goods safely; and, secondly, that Express Transport had in breach of its contract of carriage negligently damaged the machine. The damages claimed included the cost of a new machine to replace the damaged one. Express Transport in its defence denied that it was a common carrier, denied any liability under the contract of carriage and asserted that in either case the machine was carried subject to a term in the contract of carriage exempting Express Transport from liability for negligence. Express Transport also denied the amount of the damage claimed. Particulars of, and the extent of, the term exempting Express Transport from liability for negligence were sought by B.A.T., and in reply Express Transport stated that the term limiting liability appeared in the form headed "Driver's Instructions" to which I have already referred and that the limitation of liability extended to all risks.

The Chief Justice found that Express Transport was negligent and from that finding there is no appeal. He also held that Express Transport was a common carrier, that its liability as such was unaffected by any term limiting liability, and that there was no term in the contract of carriage limiting liability. Express Transport has appealed from the decision of the Chief Justice on these matters. The Chief Justice held also that, although the accident arose solely from the negligence of Express Transport, the damage suffered by B.A.T. had been contributed to by the fact that the machine had been insufficiently packed for transport. He assessed the amount of such contribution as one-third, and accordingly, only awarded to B.A.T. two-thirds of the amount which he would otherwise have awarded. The Chief Justice further held that the damages to which B.A.T. was entitled were different from the amount claimed by B.A.T. From the decision on these matters B.A.T. has cross-appealed. The cross-appeal also includes two subsidiary matters. The first is that having regard to the particulars given relating to the term limiting liability for negligence, Express Transport could not rely on any other matters as proving a term exempting liability. The second is that even though there was a term in the contract limiting liability Express Transport had committed a fundamental breach of the contract of carriage and thus could not rely on any term in that contract exempting it from liability.

The first issue on the appeal is whether Express Transport is a common carrier. If such be the position, subject to certain exceptions which I shall consider

later, its liability in respect of goods carried is that of an insurer. On the other hand, if it is a private carrier its liability would depend upon the terms of the contract of carriage, which normally would result in a duty to take care.

The concept of a common carrier stems from the common law of England, and before considering whether Express Transport is a common carrier it is necessary to consider whether such a concept exists in Tanganyika. Under s. 2 (2) of the Judicature and Application of Laws Ordinance (Cap. 453), subject to any legislation in force in Tanganyika, the common law and statutes of general application in force in England on July 22, 1920, have effect in Tanganyika so far as the circumstances of Tanganyika and its people render such a position necessary. As the concept of a common carrier existed in the common law of England before that date, it would be a concept having effect in Tanganyika unless the circumstances of Tanganyika otherwise required. Like the Chief Justice, I have grave doubts whether the concept of a common carrier with an insurer's liability for goods carried and a common law duty to carry is one which is necessary to the circumstances of Tanganyika and its people. But in my view it is no longer open to this court to consider that aspect of the matter, as the proviso to s. 103 of the Law of Contract Act (Cap. 433) shows clearly that the Tanganyika legislature regards the concept as part of the law of Tanganyika. Further, the courts in East Africa have accepted for more than half a century that the concept of a common carrier exists in East Africa, including Tanganyika (see *Khimji v. Tanga Mombasa Transport Co. Ltd.*, [1962] E.A. 419; *Lakamshi Govindji & Co. v. Hasham Suleman Ltd.*, [1960] E.A. 40; *Besson v. Esaji Allibhoy* (1906 – 08), 2 L.R.E.A. 8; and *British Trading Co. v. Uganda* (1910), 2 U.L.R. 1). Finally, the provisions of Part IV of the East African Railways and Harbours Act (Cap. 3 of the Laws of the East African Community) are obviously framed on the basis of the concept of the liability attaching to a common carrier.

Accepting, therefore, that a common carrier can exist in Tanganyika, what are the legal attributes of a common carrier and as a matter of fact is Express Transport a common carrier? There has never been in England complete certainty as to the attributes a carrier must possess before he can be said to be a common carrier as opposed to a private carrier. It is clear, however, that before a carrier can be said to be a common carrier of goods he must carry goods as a business and not casually, and he must hold himself out as ready to carry the goods of any person and not of any particular person. There is no necessity that there should be a fixed route or a stated timetable; and the fact that the carrier refuses to carry certain goods, for example, dangerous goods, does not mean that the carrier is not a common carrier. I have come to the conclusion, after a close examination of a number of cases and bearing in mind that the judgments in each case are related to the facts of the particular case, that the essential attribute which determines whether a carrier is a common carrier is that the carrier must hold himself out to the public as prepared to carry generally for the public and not for particular members thereof. If, therefore, a carrier reserves to himself, either by public notification or by a course of practice, complete freedom of selection as to the persons for whom he will carry goods, he is not a common carrier. On the other hand, if a carrier holds himself out as prepared to carry generally for the public, the mere fact that he may refuse for good reason in a particular case to carry for a particular person does not mean that he ceases to be a common carrier (see *Crouch v. London and North Western Railway Co.* (1854), 139 E.R. 105; *Nugent v. Smith*, [1876] 1 C.P.D. 423; *Peek v. North Staffordshire Railway Co.* (1862), 11 E.R. 1109; *Belfast Ropework Co. v. Bushell* [1918] 1 K.B. 210; and *Date and Cocke v. Sheldon & Co.* (1921), 7 Ll.L. Rep. 53). Whether Express Transport has the legal attributes of a common carrier and is thus a common carrier is a question of fact. The Chief Justice found in this case that Express Transport was a common carrier and in my view the evidence of

the witnesses for Express Transport amply justifies that finding. That evidence, in broad outline, was that Express Transport held itself out as prepared to transport goods for anyone who desired his goods to be transported, subject, of course, to the availability of transport. There was also evidence that Express Transport had on occasion refused to transport certain goods offered for transport and might do so in the future, but it was quite clear that any such refusal was based on reasonable grounds and not dependant upon pure whim. As I have said, if a carrier holds himself out, as Express Transport does, as prepared to carry goods for all and sundry he becomes a common carrier, and the mere fact that he on occasion refuses for good reason to carry goods, as Express Transport has done, does not mean that he thereby ceases to be a common carrier. I am satisfied that the Chief Justice was correct in his finding of fact that Express Transport was a common carrier.

The next issue on the appeal is whether a common carrier can by contract limit his liability and, if so, whether in this case Express Transport had limited its liability to B.A.T.

As I have said, the common law liability of a common carrier is that of an insurer of goods subject to certain exceptions. These exceptions are: act of God or of the Republic's enemies (see *Peek's case (supra)*); inherent vice, which would include normal wear and tear and improper packing (see *Lister v. Lancashire Railway Co.*, [1903] 1 K.B. 878; *Nugent's case (supra)*; *Gould v. South Eastern Railway Co.*, [1920] 2 K.B. 186; and *Kanti v. British Traders Insurance Co., Ltd.*, [1965] E.A. 108); and deliberate act of the consignor (see *Omer v. Prudential Assurance*, [1966] E.A. 79). In England this common law liability was modified by the Carriers Act 1830, and the Carriers Act Amendment Act 1865. These Acts are statutes of general application and thus have effect in Tanganyika to limit and modify the common law in relation to common carriers. Under the Carriers Act 1830, the previous right of a common carrier to limit his common law liability by public notice was removed, but he continued entitled to limit his liability by special contract (see *Peek's case (supra)* per Blackburn, J. at p. 118). I am satisfied, therefore, that in Tanganyika a common carrier can limit his common law liability, as modified by the Carriers Acts, by a special contract.

This being so, the next matter for consideration is whether Express Transport had done so in this case. As I have pointed out, since the Carriers Act 1830, the limitation of liability could not be obtained by public notice; thus, even if the statements in the "Driver's Instruction" form and in the format of the Express Transport note-paper were to be regarded as public notice, they would have no effect on the limitation of liability, as this could arise only by contract. The Chief Justice found that there was no clause in the contract between the parties limiting the liability of Express Transport. On appeal it was submitted that the Chief Justice should have held that there was an implied term limiting the liability of Express Transport. It was urged that such a term should be implied by reason of the previous dealings between the parties in the light of the words in the "Driver's Instruction" form and the format of the note-paper, and in view of the statement that B.A.T. would take out insurance of the machinery. On the cross-appeal objection was taken to any matter other than the "Driver's Instruction" form being considered in this respect having regard to the particulars delivered. I agree. Where a party has given particulars in relation to any matter, then, unless an amendment thereto is granted, he cannot go outside those particulars and given evidence of other matters in support of the proposition in respect of which the particulars were given. But even if all the matters urged by Express Transport were taken into consideration, this still would not suffice to show that the contract had been entered into on the basis of a term limiting liability for negligence and that therefore such a term should be implied. As there was no

written contract setting out the terms, the precise terms of the contract which undoubtedly existed would have to be implied; and the courts would always lean against implying a term limiting liability, the more especially when the term the defendant seeks to imply is not raised, as was the position in this case, until the hearing of the suit. Finally, when the term which it is sought to imply is one excluding liability for negligence, the courts should not imply such a term unless it is clear beyond doubt that both parties fully appreciated that the contract was made on that basis. It is urged that B.A.T. must have been aware that Express Transport had entered into the contract on the basis of the exclusion of liability for negligence as there had been previous dealings between the parties in the course of which B.A.T. had had ample opportunity of noticing the statements on the "Driver's Instruction" form and in the format of the note-paper, and that it must have been for this reason that B.A.T. undertook to insure the machines. It was also emphasised that Mr. Shiel had said in the evidence that he assumed generally there were conditions to the contract and in the light of the factors I have referred to he must have assumed that the exclusion of liability for negligence was one of those conditions. I do not accept that such facts would suffice to imply a term limiting liability. Even if a party to a contract knows generally from previous dealings that there are conditions but is unaware of any particular condition, the courts will not imply a condition excluding liability for negligence unless the fact that such a term is one of the conditions has actually been brought to his notice, so that he would be in no doubt that the contract was entered into on that basis (see *McCutcheon v. MacBrayne Ltd.*, [1964] 1 All E.R. 430). It has not, in my view, been proved that any responsible officer of B.A.T. was aware that Express Transport had entered into the contract of carriage on the basis of a term excluding liability for negligence. I agree entirely with the Chief Justice that there was no such term in the contract between B.A.T. and Express Transport. I have dealt with the position on the basis that the statements on the "Driver's Instruction" form and the note-paper were wide enough to exclude liability for negligence. As Express Transport is a common carrier with a liability wider than one based solely on negligence, any clause excluding liability would be construed as relating only to that liability which would arise without negligence, unless it was quite clear that liability for negligence was also excluded. It was not, I think, challenged that the words "owner's risk" would in the case of a common carrier be construed as excluding liability which arises irrespective of negligence and would give no exemption from liability based on negligence. For these reasons, in my view, the appeal fails and should be dismissed.

I turn now to consider the cross-appeal. The first issue is whether the Chief Justice was correct in reducing the damages which B.A.T. could recover on the ground that, though the accident was due solely to the negligence of Express Transport, the amount of the damage suffered by the machine had been contributed to by B.A.T. in failing adequately to crate the machinery. It is submitted, first, that the Chief Justice was wrong in finding as a fact that the machine was insufficiently packed and, secondly, that even if it was insufficiently packed, the Chief Justice was wrong in law in reducing the damages in view of his finding that the accident arose solely from the negligence of Express Transport. I shall consider the latter submission first, since if it is correct then it is unnecessary to consider the finding of fact.

When damage is caused to a plaintiff by the wrongful act of a defendant, then, subject to what I shall state, the plaintiff is entitled to recover the actual damage suffered in consequence of the defendant's act except in so far as that damage is too remote to be taken into consideration. Where the plaintiff has been guilty of negligence which has contributed to the damage, or where he has failed to take such action as it was his duty to take to mitigate the damage, then the amount of the damages which the defendant will be called upon to pay to the plaintiff will

be reduced appropriately. The Chief Justice held that the accident which caused the damage was caused solely by the negligence of Express Transport. The damage to the machine was a direct and foreseeable consequence of the negligent act of dropping the machine. No negligent act on the part of B.A.T. had contributed to the accident, nor was there any act which could have been done by B.A.T. subsequent to the accident which would have mitigated the damage. Thus, B.A.T. would appear to be entitled to recover the full amount of the damage it had suffered. But the Chief Justice held that while no negligent act of B.A.T. had contributed to the accident, nevertheless insufficient packing had contributed to the amount of the damage and Express Transport was not liable for the amount of such contribution. This seems to me to create a defence of contributory damage, in addition to the well known defence of contributory negligence. With respect, the Chief Justice, in my view, was clearly wrong in so holding. It would seem that the true effect of the decisions in the cases dealing with insufficient packing has not been appreciated. Where damage is due to insufficient packing, which is an aspect of inherent vice, then a common carrier is not liable as such damage falls within the exception to his insurer's liability. But the damage must be caused by insufficient packing before a common carrier can escape liability. If the damage is caused by the negligence of the common carrier, then, whether or not the goods are insufficiently packed, the common carrier is liable for all the foreseeable damage flowing directly from his negligent act (see *Silver v. Ocean Steamship Co.*, [1930] 1 K.B. 416). If, for example, a person negligently knocks over a glass and it falls and is broken, he is liable to pay the full value of the glass; and it is no defence to say that if the glass had been packed in rubber it would have suffered only a small chip and, consequently, that he is not liable to pay the full value but only the reduced value of the glass. It is true that some of the earlier English cases do not draw clearly the distinction between the position where the damage arises from insufficient packing and where it arises from negligence. A good example of this lack of clarity appears in the very brief report of *Higginbotham v. Great Northern Railway Co.* (1861), 175 E.R. 1289. A careful examination of the cases, however, shows, as is to be expected from a logical consideration of the position, that if the damage was caused by negligence, then it matters not whether the goods were insufficiently packed. As Greer, L.J., says in *Silver's* case ([1930] 1 K.B. at p. 435):

“Even if the liability of the shipowner be that of a common carrier, and it is proved that the damage is within the exceptions in the contract of carriage, the owner of the goods can still recover notwithstanding the exceptions if he shows that the damage was caused by the negligence of those for whom the shipowner is responsible.”

In this case the machine would not, so far as it is known, have suffered any damage if Express Transport had not negligently dropped it. As Express Transport did so, it must reimburse B.A.T. for the loss of the machine, a loss which would have not occurred but for the negligent act of the Express Transport. For these reasons, in my view, the Chief Justice was wrong in reducing the damages and it is unnecessary to consider whether his finding of fact that the machine was insufficiently packed was or was not correct.

As I have already come to the conclusion that there was no clause in the contract of carriage exempting Express Transport from liability for negligence, it is unnecessary to consider the submission that as there had been a fundamental breach of the contract by reason of Express Transport having inadequate tackle to do the job of readjusting the load, therefore any clause exempting Express Transport from liability for negligence was ineffective. I confess, however, to no disposition in favour of the submission. I have already dealt with the subsidiary matter of the limitation imposed on Express Transport by the particulars it had given in relation to the implied term in the contract. There is, thus, left for

consideration on the cross-appeal only the submission that the Chief Justice had failed to determine correctly the amount of damage suffered by B.A.T. I confess that neither the evidence led by B.A.T. on the amount of the loss it had suffered, nor the reasons of the Chief Justice for arriving at the precise amount of Shs. 139,399/60 as being the loss suffered by B.A.T., are as clear to me as I should desire.

Where an article has been destroyed by negligence, the owner of that article is entitled to recover from the person who negligently caused the destruction the market value of the article immediately before its destruction, together with any consequential loss following on the destruction of the article which is not too remote. B.A.T. claim that they are entitled to the cost of a new machine to replace the machine which was destroyed. That is something to which they are clearly not entitled. A person is not entitled to make a profit out of damage caused to him by another; and this is precisely what would happen if B.A.T. were entitled to replace the used machine by a new machine. In addition to the value of the machine, B.A.T. claim the value of certain spares for the machine. I consider that the value of a reasonable quantity of spare parts for a machine which is destroyed would be a direct and foreseeable loss consequent upon the destruction of the machine if it were proved that those spares could not be otherwise used and had no value other than as scrap. The evidence dealing with this aspect of the matter is not entirely satisfactory, but the Chief Justice held that the total amount of the damage was Shs. 139,399/60 and ordered, subject to the one-third reduction to which I have already referred, that Express Transport pay the sum, less the scrap value of the machine and spares, to B.A.T. The ground of cross-appeal on this issue seeks only to substitute the value of a new machine for the value of the machine destroyed. I have already held that B.A.T. are not entitled to recover the cost of a new machine, thus that ground of cross-appeal fails. In the course of argument it was urged that the Chief Justice had made a clerical mistake in arriving at the cost of the machine and spares. It was submitted that the evidence showed that the original value of the machine was Shs. 158,859/95 and of the spares Shs. 5,054/61, making a total of Shs. 163,914/56; that in arriving at his figure of Shs. 139,399/60 the Chief Justice had taken the written down value of the destroyed machine in the books of B.A.T. as its market value at the date of destruction; and that in so doing he had mistakenly taken the figure of Shs. 158,859/95 for the machine alone as the figure for the cost of the machine and the spares. It is possible that the Chief Justice did do so, but as the whole position is fraught with such uncertainty, and as the matter is not strictly within the grounds of cross-appeal, I am not disposed to make any variation in the figure of Shs. 139,399/60. I would accordingly allow the cross-appeal in so far as it would result in B.A.T. recovering the full amount of the damage which the Chief Justice held had been occasioned.

For these reasons I would dismiss the appeal with costs. I would also allow the cross-appeal with costs and vary the judgment and decree of the Chief Justice so as to substitute for the amount of Shs. 92,933/- the amount of Shs. 139,399/60. I would also give a certificate for two advocates on both the appeal and cross-appeal. As the other members of the court agree it is so ordered.

Sir Clement De Lestang V-P: I agree.

Law JA: I have read the judgment prepared by the President, Sir Charles Newbold. I agree with it in all respects and cannot usefully add anything to it.

Appeal dismissed. Cross-appeal allowed. Judgment of court below varied.

For the appellants:

Byron Georgiadis and MS Shukla

George N Houry & Co, Dar-es-Salaam

For the respondent:

SHM Kanji and FA Adamjee

Fraser Murray, Roden & Co, Dar-es-Salaam

Kimweri v Republic
[1968] 1 EA 452 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	14 May 1968
Case Number:	170/1967 (77/68)
Before:	Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Platt, J

[1] Criminal Law – Murder – No body of deceased – Presumption of death – Nature of evidence required.

[2] Criminal Practice and Procedure – Murder – Evidence – Burden to be discharged by prosecution.

[3] Evidence – Admissibility – Letter alleged to have been typed on typewriter by appellant – No evidence linking letter in question with sample from typewriter.

[4] Evidence – Murder – No body of deceased – Nature of evidence upon which court will presume death.

Editor's Summary

The appellant was charged with and convicted of the murder of his wife from whom he had been separated and against whom his petition for divorce had failed. The appellant was ordered to pay maintenance to his wife and in the meantime he had a liaison with another woman. The appellant's wife had disappeared from her room on a day on which the prosecution alleged that the appellant had visited her in Moshi and a few days later the wife's father received a letter purporting to come from one Kamau and stating that the appellant's wife had gone to Nairobi with Kamau and that in the course of the journey she had been killed in a motor accident. Evidence was given to the effect that enquiries were made in Kenya and that these enquiries resulted in information being supplied to the witness that no such motor accident had occurred. The letter was not put in evidence by the father of the wife, to whom it was addressed. The prosecution sought to show that the letter was typed on a typewriter to which the appellant had access, by a typewriter expert comparing the letter in question with a sample handed to him, but no evidence was led linking the typed sample with the typewriter.

Held –

- (i) although death may be proved by circumstantial evidence that evidence must be such as to compel the inference of death and must be such as to be inconsistent with any theory of the alleged deceased being alive, with the result that taken as a whole the evidence leaves no doubt whatsoever that the person in question is dead;
- (ii) the circumstances in the present case raised a considerable suspicion that the wife was dead, but did not compel irresistibly the inference of death;
- (iii) the evidence of the truth of the contents of the letter was inadmissible; the evidence as to the possible source of the letter was doubtful in regard to its admissibility.

Appeal allowed. Conviction quashed and sentence set aside.

No cases referred to in judgment

Judgment

The following ex tempore judgment of the court was delivered by **Sir Charles Newbold P**: The appellant was charged with the murder

on November 15, 1964, of his wife, Engereza d/o Zebedayo, and was convicted of that offence and sentenced to death. He has appealed to this Court.

On the appeal Mr. Georgiadis has urged two matters; first, that there was no evidence before the trial court upon which the court could properly come to the conclusion that the wife, Engereza, had been proved to be dead; and, secondly, that there was not sufficient evidence before the court upon which, even if the wife was dead, it could be said that the appellant had been proved beyond reasonable doubt to have caused the death of his wife in circumstances in which he was guilty of the charge of murder.

Very briefly, the facts were that the appellant was married to Engereza but he had separated from her and he had a liaison with another lady. He had also petitioned for divorce from his wife which petition failed and he had been ordered to pay a certain sum of money towards her maintenance. These facts were proved by the prosecution and from these facts the prosecution asked the court to find a motive on the part of the appellant to get rid of his wife. The wife was living in Moshi and the appellant worked some distance away at Dodoma. The prosecution alleged that on the week-end of November 14/15, 1964, the appellant left Dodoma, went to Moshi, saw his wife there and at some time on the afternoon of the 15th, either in Moshi or on the way back, killed his wife. The prosecution, in support of this case, called evidence which disclosed that the appellant had been in Moshi on November 14 and also on November 15, 1964, and had seen his wife there. Evidence was given by a young girl to that effect. We might here remark that the trial took place three years after the events which form the subject of the charge and the evidence as to the appellant seeing his wife rests to a large extent upon the girl, called Rehema Juma, who at the time that the events took place must have been ten to twelve years old and who gave evidence when she was thirteen to fifteen years old – three years later. We think that in those circumstances there was at least room for some uncertainty of recollection.

The prosecution also produced evidence of a letter written by the appellant to the wife stating that he proposed to come to Moshi at that time. Evidence was also produced that the father of the wife received a letter dated November 18, purporting to come from a person called Njoroge Kamau, which letter stated that the wife had gone with Kamau to Nairobi and that in the course of the journey there had been an accident near to Nairobi and that the wife had been killed. Evidence was admitted of enquiries by the police which resulted in information that no such accident had happened. The prosecution also produced evidence of the brother of the wife to the effect that the wife had disappeared suddenly in circumstances in which her room had been left as if she were returning and that nothing had been heard of the wife since and that therefore in the circumstances it could be inferred that if she were alive she would have got in touch with her brother or her father or neighbours. Finally, the prosecution produced evidence, which was admitted, that the letter of November 18 which referred to the death of the wife and purported to come from a person called Kamau had been typed on a typewriter which was one of a number of typewriters in the office of the appellant and to which he could have had access.

Broadly, it is on those facts that the prosecution sought to ask the court to hold, first, that the wife was dead; secondly, that the appellant had killed her. On the first point, while death may be proved by circumstantial evidence, without evidence as to the production of the body of the allegedly dead person and without any evidence of a person who saw the body of the dead person and without a confession by a person accused that he caused the death, yet where a court is asked to find in a murder charge that a person is dead in the circumstances which we have stated, the evidence on which the court is asked to infer the death must be such as to compel the inference of death and must be such as to be inconsistent with any reasonable theory of the alleged deceased being alive, with the result that

taken as a whole the evidence leaves no doubt whatsoever that the person in question is dead. We would give as an example of what we mean the case of a person on a ship in the middle of the ocean: evidence is given that a scream was heard, and a splash was heard, but there is no evidence that any particular person was seen to go overboard. The ship is searched and subsequently a person in relation to whom evidence is given that that person was a passenger on that ship is found to be missing. In those circumstances, although there was no evidence of a body, although no-one came forward and said that the body of the alleged deceased was seen and although there was no confession by anyone, nevertheless those circumstances are such as to compel the inference of death.

Now what are the circumstances in this case? They are that the alleged deceased, the wife, disappeared suddenly, without explanation, and that this happened at about the time when the appellant, who had a motive to dispose of her, was in the vicinity and had seen her; that subsequently a letter arrived referring to her death in an accident, which letter was typed upon a typewriter to which the appellant could have had access, and that as a result of enquiries it had been found that there had been no accident of the nature referred to in the letter. For the moment we will accept, in setting out the circumstances, that the circumstances we have detailed were properly proved by admissible evidence. We think that those circumstances raise a considerable suspicion that the wife is dead. But we feel unable to come to the conclusion, in a criminal charge of murder, that these circumstances, suspicious as they may be, compel irresistibly the inference of death. We feel that we are unable to say that we are satisfied beyond any possibility of doubt that the wife is dead, even though we may have the strongest suspicions to that effect. We might point out that even in civil law it requires seven years before a court will normally presume death and in this case what the court is asked to do in a criminal charge of murder is to presume death after three years. For this reason alone, we consider that this appeal should be allowed. We might mention that in arriving at this decision we have not taken into account the somewhat peculiar finding of the trial judge that he accepts the evidence of a witness that the deceased was seen on November 24 in court when quite obviously the case for the prosecution is that she was killed much before that date. We can only assume that this was some mistake on the part of the trial judge, because if the judge made that finding he must, in our view, have acquitted the appellant; so that we pay no attention to that aspect of his judgment.

Earlier we have referred to certain circumstances from which the death is to be presumed; we have said that even if those circumstances were proved to be the circumstances in existence still we do not consider that they pointed compellingly and irresistibly to the wife being dead. We would here mention that we are satisfied that some, if not all, of those circumstances were proved by evidence which was inadmissible. As far as the evidence of the letter referring to the accident is concerned, what happened was that a Tanzanian witness gave evidence of the result of enquiries made in Kenya. From these enquiries he was informed that no such accident had happened and that no such person had died. That evidence was inadmissible. The result is that the lack of truth of the contents of the letter of November 18, upon which the prosecution so relied in order to prove the guilt of the appellant, had not been proved. We might also mention that the evidence linking the letter of November 18 with the appellant had been proved to be inadmissible evidence. The evidence was that the typewriter expert had compared the letter in question with a sample handed to him which purported to come from the typewriter to which the appellant could have had access. The prosecution did not call the person who typed that sample. Thus there is no admissible evidence that that letter was typed on a typewriter to which the appellant could have had access. Finally, the letter of November 18 itself is, to say the least, doubtfully admissible. This is a letter which purports to be addressed to

the father of the wife. It should therefore have been produced in evidence by the father, or at least he should have been called to say that he received the letter and that he handed it to somebody else who subsequently produced it. That was not done. There is evidence by the brother, Joshua, to the effect that the letter went to the father through him, the brother, and that the father subsequently gave it to him. It is possible that if the receipt of the letter by the father took place in the presence of Joshua, then Joshua could have produced the letter without the necessity of calling the father himself. For that reason we do not hold that the letter was inadmissible, but merely say that the evidence as to its admissibility was doubtful. For these reasons we have come to the conclusion that the prosecution have failed to prove in this murder charge the death of the deceased.

It is thus unnecessary to consider the second issue raised by Mr. Georgiadis, which was whether, assuming the death, the prosecution have failed to prove that the appellant was responsible for that death. Again, we might say that there are very suspicious circumstances, but whether the evidence is such as to leave no reasonable doubt that he was responsible for the death is subject to argument. It is, however, a matter into which we need not go for the reason that we have decided the first issue raised by Mr. Georgiadis in his favour. Accordingly the conviction must be quashed, the sentence set aside and the appeal allowed.

Order accordingly.

For the appellant:

B Georgiadis

D Cassidy, Moshi

For the respondent:

SK Laxman (State Counsel, Tanzania)

Attorney-General, Tanzania

Malima v Republic
[1968] 1 EA 455 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	5 February 1968
Case Number:	39/1967 (83/68)
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] *Appeal – Fresh evidence – Evidence taken by appeal court – Proper procedure followed – No injustice to appellant – Magistrates Courts Act, s. 17 (a) (T.).*

[2] *Criminal Practice and Procedure – Appeal – Further evidence taken by appeal court – Magistrates*

Courts Act, s. 17 (a) (T).

Editor's Summary

The appellant was convicted of housebreaking and stealing and on appeal against sentence and conviction to the district court, the learned magistrate took additional evidence on the point of whether there had been a “breaking” of the premises concerned. The evidence was taken in the presence of the appellant who cross-examined the witness. The appeal was dismissed and the appellant appealed to the High Court.

Held – The procedure followed by the magistrate in taking additional evidence was a proper one and no injustice was done to the appellant.

Appeal dismissed.

No cases referred to in judgment

No appearances for the appellant or the respondent.

Judgment

Hamlyn J: The appellant was convicted of offences of housebreaking and stealing, contrary to ss. 294 (1) and 265 of the Penal Code, in the primary court of Ruangwa and was sentenced to two years' imprisonment and twenty-four strokes on the first count, and to six months' imprisonment on the second count, to be served concurrently with the period of imprisonment on the first count. From such convictions and sentences he appealed to the district court of Lindi, where his appeal was dismissed. He now appeals to this court.

Before dismissing the first appeal, the district court observed that the evidence taken in the court of first instance was not clear as to whether there had actually been a "breaking" of the premises concerned. It therefore took additional evidence on this point in the presence of the appellant, who cross-examined the witness. This was perfectly proper under the provisions of s. 17 (a) of the Magistrates' Courts Act and no injustice was done to the appellant who had the opportunity of cross-examining the re-called witness. On such evidence the district magistrate dismissed the appeal.

There is no merit whatever in the appeal to this court. The appellant gave evidence and seems to have set up an alibi which rather broke down when he produced a witness on his own behalf. There is nothing upon the record to show that he wished to call any further person to give evidence on his behalf after the first witness for the defence had denied all knowledge of the alibi.

On the evidence on the record, there is ample testimony upon which the trial magistrate could safely conclude that the case for the Republic was proved against the appellant. The two assessors who sat with the magistrate both advised the court that, in their opinion, the case was fully proven, and I consider that the verdict was reasonable on the evidence before the court.

I am of opinion that the evidence before the lower courts leaves no reasonable doubt as to the appellant's guilt and that the appeal is without substance; there is no material circumstance of the case which could lead this court to consider that the sentence ought to be reduced – that on the first count being in accordance with the provisions of the Minimum Sentences Act, 1963. After perusing the record, I am satisfied that the appeal has been lodged without any sufficient ground of complaint and I consequently order that it be summarily rejected forthwith.

Appeal rejected.

Mwananchi Engineering and Contracting Co v Teja [1968] 1 EA 457 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	25 April 1968
Case Number:	17/1967 (84/68)
Before:	Biron J
Sourced by:	LawAfrica

[1] Rent Restriction – Possession – Vacant possession in public interest – Whether reasonable to grant such possession – Shortage of alternative accommodation admitted – Conflict of public interests – Rent Restriction Act 1962, s. 19 (1) (n), (11) (T.).

Editor’s Summary

The respondent landlord was granted an order for vacant possession of a flat let to one of the employees of the appellant company on the grounds that he required possession of the premises for the purposes of re-development and the Minister had certified that such re-development was in the public interest, in terms of s. 19 (1) (n) of the Rent Restriction Act 1962 (as amended). In granting the order, the Chairman of the Board stated – “In any event I do not think it unreasonable for vacant possession to be given in view of the fact that the premises are required for re-development for public interest.” Section 19 (2) of the Act provides that no order for the recovery of premises shall be made unless the court is satisfied, by or on behalf of the landlord, that “having regard to all the circumstances of the case, it is reasonable to make such an order”. This appeal was brought on the grounds that the Board had erred in law by failing to weigh a conclusion on the issue of reasonableness and, in particular, erred in treating the public interest as an overriding consideration to the exclusion of all other factors.

Held –

- (i) the statement “I do not think it unreasonable” by the Chairman of the Board did not constitute a positive finding that the Board was satisfied that it was reasonable to make an order for possession;
- (ii) no circumstance other than the public interest factor of the re-development proposal was considered by the Board;
- (iii) the appeal court had sufficient material before it to determine the question of reasonableness;
- (iv) there was an apparent clash of public interest between the re-development of the premises and the shortage of housing accommodation;
- (v) the order of the Rent Restriction Board granting vacant possession should be varied to include a condition that vacant possession should not be delivered up until reasonable alternative accommodation was available to the person in actual occupation.

Appeal allowed with costs.

No cases referred to in judgment

Judgment

Biron J: This is an appeal brought by the appellant company from the decision of the Dar-es-Salaam Rent Restriction Board granting the respondent landlord possession of a flat occupied by the company in the person of one of its employees.

The material facts of the case, most of which are not in dispute, can briefly be summarised as follows. The flat, the subject matter of the suit, is one of sixteen comprised in a four-storey building owned by the landlord, there being

four flats on each floor. The landlord is desirous of converting the ground floor into commercial premises, with shops at the front and offices at the rear. He has obtained the necessary planning permission from the Dar-es-Salaam City Council, and the plans he has had drawn up for the conversion of the flats into commercial premises have been approved. He has also obtained the appropriate certificate from the Minister to the effect that the re-development of the ground floor for commercial purposes is in the public interest.

By s. 19 (1) of the Rent Restriction Act 1962, as amended by the Rent Restriction (Amendment) (No. 2) Act 1966:

“No order or judgment for recovery of possession of any premises to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless”

There then follows various grounds, circumstances and conditions whereunder an order for possession may be granted, the one relevant to this case being that at sub-para. (n), which reads:

“The landlord requires possession of the premises for purposes of redevelopment otherwise than as a dwelling house and the Minister has certified that such re-development is in the public interest.”

And by sub-s. (11) of the same section:

“For the purposes of para. (n) of sub-s. (1), a certificate purporting to be signed by the Minister that the re-development to which the certificate relates is in the public interest shall be admissible in evidence before the court (or a Board, as the case may be) without further proof.”

By sub-s. (2) of the same s. 19 of the Act, as amended by the Rent Restriction (Amendment) (No. 2) Act above referred to:

“No order for the recovery of possession of premises shall be made unless the court is satisfied, by or on behalf of the landlord, that having regard to all the circumstances of the case it is reasonable to make such an order.”

The rest of the subsection is not relevant.

In the decision of the Board, the learned chairman, after setting out and reviewing the facts, directed himself, *inter alia*, that the Board could not go behind the Minister’s certificate which, as noted, the landlord had obtained, and the chairman went on to say and conclude the Board’s decision as follows:

“In any event I do not think it unreasonable for vacant possession to be given in view of the fact that the premises are required for redevelopment for public interest. Although this are (sic) being converted into commercial use, that also is a public interest having been certified by the Minister responsible.

However, I consider it proper in view of accommodation difficulties in Dar-es-Salaam to suspend the order for vacant possession until two months before construction work begins and order accordingly.”

In its memorandum of appeal the appellant company avers that:

- “1. The Board erred in law in the determination of the issue of reasonableness by basing its finding on an incorrect principle.
2. The Board erred in law in failing to duly weigh all the relevant considerations before reaching a conclusion on the issue of reasonableness and, in particular, erred in treating public interest as an over-riding consideration to the exclusion of all other factors.”

It must be conceded at once that the Board erred in principle, as submitted by the appellant. However subtly it is argued that a double negative makes a positive, in my judgment, it cannot be gainsaid that the expression "I do not think it unreasonable" does not constitute a positive finding that the Board was in fact satisfied that it was reasonable to make an order for possession. Likewise, the submission by the appellant that the Board accepted the factor that the re-development is in the public interest is an over-riding consideration in determining whether an order for possession should be made, is also, to my mind, unanswerable. In fact, one could be excused for saying that this factor would appear to be the sole criterion, as no other factor or circumstance was considered or even mentioned. The fact that the Board suspended the vacating of the premises until two months before construction work begins, on account of, as so stated in the decision, accommodation difficulties, which Mr. Kesaria, for the respondent, submits indicates that the Board took into consideration other factors in making the order, does not, to my mind, demonstrate, by relation back, that the Board, in making the order for possession, took into consideration any factor other than that the Minister had certified that the re-development was in the public interest. The factor of the housing shortage, acknowledged by the Board, was merely taken into consideration for the purpose of delaying the enforcement of the order, not the making of the order. As evident from the wording of the relevant provisions, the Board cannot make an order for possession unless it is satisfied "by or on behalf of the landlord, that having regard to all the circumstances of the case it is reasonable to make such an order". However, I agree with the submission of Mr. Kesaria that this court can now determine the question of reasonableness, in that it has before it sufficient material to decide such issue.

Of the twelve flats on the upper floors, eight are let out to the Tanzania Government, three to the Canadian High Commission and one to the Tanzania Millers. Of the four ground-floor flats, only two are now occupied, one by the appellant and the other by Haji Brothers, the tenants of the other two flats having vacated their flats. Since the landlord has attempted to obtain vacant possession of the ground-floor flats for the purposes of re-development, at least two flats on the other floors have become vacant and have been re-let. I accept the respondent's statement that one of the flats which became vacant had been let out to the Canadian High Commission on a lease the term of which had not expired when the flat was vacated by its occupant, an officer of the Canadian High Commission, and he was succeeded by another officer of the High Commission who went into occupation. However, the other flat which became vacant was at the disposal of the landlord, yet he let it out to a third party. In answer to the court why the landlord had not made this flat available to one of the tenants from the ground floor whom he was seeking to evict, Mr. Kesaria stated that, as there were several tenants to choose from, the landlord could not decide which and therefore disposed of the vacant flat to a third party. With respect, I find this explanation lame in the extreme. This action on the part of the landlord is, I consider, a relevant factor to be taken into consideration in determining the issue of reasonableness. A further factor which, I think, can also be taken into consideration, is the person and position of the tenant in actual occupation of the flat, possession of which is sought. He, as noted, is an employee, a yard manager of the appellant company, in which the National Development Corporation has more than a fifty per cent. interest. Just as it is in the public interest to have the premises, or, rather, the ground floor of the premises, re-developed to commercial user, likewise it is in the general public interest for the constituent members of the public to be housed – which, incidentally, is the main purpose of the Rent Restriction Act – and particularly so, when the member of the public in question is an employee of a parastatal body occupied in the public service. This particular factor is further relevant in that eight flats in the building are let out to the

Government, for the occupation of Government servants. There is therefore every likelihood of one such flat becoming vacant, and the Government would obviously give preference to someone who, like the tenant, is engaged in Government service. Although there is an apparent clash in public interest, that is, for re-development on one side, and for housing – in this case – one of its servants, on the other, the two interests are not irreconcilable. Although this court, like the Board, cannot go behind the Minister's certificate that the re-development sought is in the public interest, there is in no wise any urgency in the matter. The public interest would not suffer much, if at all, if the re-development were delayed until such time as alternative accommodation becomes available to the appellant tenant, which, as demonstrated, should not necessarily be unduly long.

In the circumstances, taking all the relevant factors into consideration, and bearing in mind that it is on the landlord to establish reasonableness, and not the other way round, I consider that the appellant tenant should not be evicted until alternative accommodation is available for him.

In the result, the appeal is allowed with costs, and the order of the Rent Restriction Board, granting vacant possession, is varied to include a condition that vacant possession is not to be delivered up until reasonable alternative accommodation is available to the tenant, that is, the person in actual occupation, as opposed to his company.

Order accordingly.

For the appellants:

AA Lakha

Fraser Murray, Roden & Co, Dar-es-Salaam

For the respondent:

RC Kesaria

RC Kesaria, Dar-es-Salaam

Patel v Benbros Motors Tanganyika Ltd [1968] 1 EA 460 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	18 June 1968
Case Number:	5/1968 (86/68)
Before:	Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Hamlyn, J

[1] *Master and servant – Summary dismissal of employee – Security of Employment Act 1964, s. 28 (T.)*

– Removing jurisdiction from courts – Whether effect of section could be retrospective.

[2] Statute – Retrospective effect – Removal of jurisdiction from the courts – Security of Employment Act 1964, s. 28, (T.) – Procedural but not retrospective.

Editor's Summary

The appellant was dismissed from his employment on August 4, 1964, after having been suspended by his employer on July 27, 1964. On November 2, 1965, after writing various letters stating claims against his employer, the appellant filed a plaint. In the meantime, the Security of Employment Act 1964 had been passed and was brought into operation on May 1, 1965. Section 28 of that Act reads: "No suit or other civil proceedings . . . shall be entertained in any civil court with regard to summary dismissal . . . of an employee . . .". The respondent urged that the effect of s. 28 was to take away the jurisdiction of the courts to entertain claims based on summary dismissal unless the plaint was filed before May 1, 1965. The appellant argued that s. 28 only applied where the summary

dismissal took place on or after May 1, 1965. The High Court on first appeal having held that the court had no jurisdiction (see [1968] E.A. 247), the appellant brought this second appeal to the Court of Appeal.

Held –

- (i) although there is a rule of construction that *prima facie* if a provision affects procedure only it operates retrospectively, there is a further rule that the courts will not construe a legislative provision so as to exclude the jurisdiction of the courts, unless it is manifestly the intention of the legislature so to provide;
- (ii) declaring the provision retrospective would be to deprive an employee wrongfully dismissed before the Act of all remedy, and would be contrary to the intention of the legislature which designed the Act to improve the position of employees;
- (iii) the court therefore had jurisdiction to hear cases where the summary dismissal took place before May 1, 1965.

Appeal allowed with costs and case remitted to the High Court to hear the appeal on its merits.

Case referred to:

- (1) *Municipality of Mombasa v. Nyali Ltd.*, [1963] E.A. 371.

June 18, 1968. The following considered judgments were read:

Judgment

Sir Charles Newbold P: This is a second appeal. The appellant, an employee, filed a plaint on November 2, 1965, in the district court of Dar-es-Salaam against the respondent, his employer, claiming various sums on the ground that the employer was in breach of the contract of service in refusing to allow the employee to work. A preliminary point was taken on behalf of the employer that the normal courts had no jurisdiction to hear the claim by reason of s. 28 of the Security of Employment Act 1964 (Cap. 574) (hereinafter referred to as the Act). The resident magistrate held that he had jurisdiction to hear the matter and after hearing the evidence gave judgment for the employee for the full amount of his claims. The employer appealed to the High Court on a number of grounds, but before the appeal was heard on its merits the preliminary point was again agitated. The High Court held that the district court had no jurisdiction to entertain the plaint. From this decision the employee appealed, with leave, to this court.

The facts, so far as they are relevant to the issue on this appeal, are that on July 25, 1964, a report was made against the employee and on July 27, whether rightly or wrongly is irrelevant to this appeal, the employee was suspended by the employer pending investigations by the police. After investigation no action was taken by the police. On August 4, 1964, the employer sent for the employee and paid the employee his salary up to July 25. The employee thereafter sought to obtain other employment but failed to do so. On December 16, 1964, an advocate, on behalf of the employee, wrote claiming the various sums later claimed in the plaint and on the claim being rejected a plaint was filed on November 2, 1965. The Act was enacted in 1964 but the relevant part was not brought into operation until May 1, 1965. The defence, in addition to denying liability, raised the preliminary point to which I have referred. That point failed before the resident magistrate but succeeded before the High Court. Should this appeal be

successful and it be held that the normal courts had jurisdiction to entertain the plaint, the matter will have to be remitted to the High Court for the appeal to be heard on its merits.

The Act, as can be gathered from its title and as is confirmed by its preamble and its provisions, was enacted for the betterment of the conditions of employees.

By s. 19 no employer shall summarily dismiss any employee save for breaches of the Disciplinary Code, which is set out in a Schedule to the Act and which permits of summary dismissal in certain specified cases. Sections 21 and 22 provide for the action to be taken by an employer where, *inter alia*, he proposes summarily to dismiss an employee, and s. 23 provides that an employee summarily dismissed may refer the matter to a Board. Section 28 then reads as follows:

- | | |
|---|--|
| “Exclusion
of the
jurisdiction

of the
courts. | (1) No suit or other civil proceeding (other than proceedings to enforce a decision of the Minister or the Board on a reference under this Part) shall be entertained in any civil court with regard to the summary dismissal or proposed summary dismissal, or a deduction by way of a disciplinary penalty from the wages, of an employee. |
| | (2) In this section, ‘civil proceeding’ includes a cross suit or counterclaim, any set off and any civil proceeding under Part XI of the Employment Ordinance.” |

The employer urges that s. 28 has taken away the jurisdiction of the courts to entertain claims based on summary dismissal unless the claim was filed before May 1, 1965. The employee urges that s. 28 only applies where the summary dismissal takes place on or after May 1, 1965, and that in any event it does not apply as he was suspended and not summarily dismissed. The employee goes to the extent of saying that the employer never terminated the contract of service, but that the termination took place by the act of the employee in writing the letter of December 16, 1964, and that until then the contract of service was suspended and he was entitled to payment of his dues under that contract. If this is so, then the employee, possibly in a true Yuletide spirit, made a present to his employer by releasing him from any liability for payment of salary over the Christmas season. I am satisfied, however, that the employee, though originally suspended, was summarily dismissed on August 4, 1964, when he was called by his employer and paid his salary up to July 25. That the employee understood he was so dismissed is shown by his evidence that he then sought other employment. It was submitted that where one party to a contract by his action repudiates the contract, the contract is not rescinded until the other party accepts the repudiation. This may be so, but in the case of a contract of service an employee who has been summarily dismissed cannot keep the contract of service alive until he chooses, if he ever does so, to accept the termination of the contract. There will be either an actual or implied rescission, which will have effect from such date as is appropriate on the particular facts. In this case the contract was rescinded on August 4, 1964, when the employee accepted the money paid to him and thereafter sought alternative employment.

Turning now to the main issue on the appeal, that is whether the courts had jurisdiction to entertain the employee’s claim, there is no provision in the Act which sets out whether the provisions of s. 28 apply only in respect of a summary dismissal which takes place after the commencement of the Act. Section 48 provides that, subject to the exclusion of the jurisdiction of the courts set out in s. 28, certain provisions of the Employment Ordinance are to have effect, but this example of legislation by reference, as is usually the case, certainly does not help to clarify the position. It is urged by the employee that s. 28 only applies to a summary dismissal which takes place after May 1, 1965, the date of the commencement of the Act. It is urged on the other hand by the employer that the section applies retrospectively to every summary dismissal, no matter when it takes place, in respect of which proceedings are filed in the courts on or after May 1, 1965.

In *Municipality of Mombasa v. Nyali Ltd.* I said this ([1963] E.A. 371, at p. 374):

“Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, *prima facie* it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention.”

In my view s. 28 is clearly a procedural section as it deals with the means of enforcing a right and not with the right itself. On the other hand, it is a section which clearly excludes the jurisdiction of the normal courts of justice; and it is a rule of construction that the courts will not construe a legislative provision in such a manner as to exclude the jurisdiction of the courts, save in so far as it is manifest that it is the intention of the legislature so to provide. This section excludes the jurisdiction of the courts “with regard to the summary dismissal or proposed summary dismissal” of an employee. Section 19 of the Act prohibits summary dismissal save for breaches of the Disciplinary Code in circumstances in which summary dismissal is a penalty permitted by that Code. It would seem, therefore, that the words “summary dismissal” are to be construed with reference to the Disciplinary Code and as that Code only had effect from May 1, 1965, the words “summary dismissal” in s. 28 should apply only to summary dismissal taking place after May 1, 1965. This construction is, in my view, confirmed by the requirement that an employer, before he summarily dismisses an employee, must take the action set out in ss. 21 and 22, which action of course he could not take until the Act came into operation. Further, under s. 23 an employee who is summarily dismissed may refer the matter to the Board within seven days of his summary dismissal; and it is obvious he could not do so before the Act came into operation save in the special case where the summary dismissal took place not more than seven days before that date. To construe s. 28 as having retrospective operation would be to deprive an employee wrongly dismissed before the commencement of the Act, but who had not commenced the proceedings before that date, of all remedy save in the very special case where summary dismissal took place within seven days before the commencement of the Act. To construe a provision in an Act which is designed to better the position of an employee in a manner which could impose on him great injustice would, in my view, be to construe that provision in a way completely contrary to the intention of the legislature. For these reasons, even though s. 28 is a procedural section, in my view it should not be construed to have retrospective operation and should be construed so as to exclude the jurisdiction of the courts only in the case where the summary dismissal takes place on or after May 1, 1965.

Accordingly I would allow the appeal and set aside the judgment and decree of the High Court and remit that matter to the High Court with a direction to hear the appeal on its merits. I would order that the costs of the appeal to the High Court, both in respect of the hearing up to date and the future hearing on the remission, be in the discretion of the judge hearing the appeal.

As regards the costs of the appeal before us, I would order the respondent to pay those costs. As the other members of the court agree it is so ordered.

Sir Clement De Lestang V-P: I agree and have nothing to add.

Law JA: I have had the advantage of reading in draft the judgment prepared by my Lord the President. I agree with it entirely and cannot usefully add anything.

Appeal allowed. Case remitted to the High Court.

For the appellant:

NP Patel

Natubhai Patel, Desai & Co, Dar-es-Salaam

For the respondent:

AA Lakha

Fraser Murray, Roden & Co, Dar-es-Salaam

Commissioner-General of Income Tax v Kiganga Estates Ltd
[1968] 1 EA 464 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	28 June 1968
Case Number:	6/1968 (88/68)
Before:	Sir Charles Newbold P, Sir Clement de Lestang V-P and Spry JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Rudd, J

[1] Income Tax – Deduction – Investment allowance – Deduction in respect of investment for processing local materials – Company carrying on business of “husbandry” – Only one business – Not business of “carrying on trade” within Part IV, para. 27, Second Schedule, East African Income Tax (Management) Act 1958 – Whether investment allowance to be allowed as well as allowance for capital expenditure for farm works.

Editor’s Summary

The respondents carried on the business of growing and preparing to the marketable stage tea, and all such activities were conceded to be for the purpose of husbandry. In terms of Part IV, para. 25 of the Second Schedule to the East African Income Tax (Management) Act 1958, one-fifth of the capital expenditure incurred for the purpose of husbandry on the construction of farm works on agricultural land might be deducted in each of five consecutive years. The company claimed and was granted such a deduction in respect of expenditure on the construction and extension of a tea factory. The company conceded that it carried on only one business which was for the purpose of husbandry; but in addition it

claimed an investment allowance under Part V, para. 27 of the Second Schedule to the Act for capital expenditure for the purpose of a trade in processing goods or materials of local origin. The Commissioner-General refused to allow this investment allowance. The company having successfully appealed to the High Court, the Commissioner-General appealed to the Court of Appeal.

Held –

- (i) if the activities of a person form an integral part of a larger trade or business carried on by him as one integral trade or business, he cannot be said to be carrying on also the multifarious trades which could be attached to these activities;
- (ii) the company was not, therefore, carrying on the trade of subjecting materials of local origin to any process and was therefore not entitled to an investment allowance under para. 27.

Observations as to whether there can be double deductions in respect of the same expenditure.

Appeal allowed with costs.

No cases referred to in judgment

June 28, 1968. The following considered judgments were read:

Judgment

Sir Charles Newbold P: This is an appeal by the Commissioner-General of Income Tax (hereinafter referred to as the Commissioner) against a decision of the High Court amending an assessment to income tax for the year of income 1965 made on a company which is the owner of a tea estate. The facts are not in dispute and so far as they are relevant may be stated as follows.

The company incurred capital expenditure on the construction or extension of buildings forming part of a factory on the estate, in which factory tea was processed, and on the purchase of machinery for use in the factory; and such building and machinery was first used in 1965. The company claimed and was granted a deduction in respect of such capital expenditure under Part IV, para. 25, of the Second Schedule to the East African Income Tax (Management) Act 1958, as amended (hereinafter referred to as the Act). Under that paragraph one-fifth of the capital expenditure incurred for the purposes of husbandry on the construction of farm works on agricultural land may be deducted in each of five consecutive years. It is accepted by the company that it pursues only one business, which is the growing and preparing to marketable stage of tea, and that all of such activities are “for the purposes of husbandry”. In addition the company claims an investment allowance under Part V, para. 27, of such Second Schedule. That paragraph, so far as is relevant, reads as follows:

“27. Subject to this Schedule, where:

...

- (c) a person incurs capital expenditure to which this Schedule applies on the construction of an industrial building . . . which is used by him . . . for the purposes of a trade which consists in the . . . subjection of goods or materials of local origin to any process . . .

...

- (e) the owner of a building incurs . . . capital expenditure to which this Schedule applies on the purchase and installation of machinery in such building which building and machinery is subsequently used for the purposes of a trade which consists in the . . . subjection of goods or materials of local origin to any process . . .

there shall be deducted in computing his gains or profits for the year of income in which the . . . building or extension or machinery is first so used a deduction (referred to as an ‘investment deduction’) equal –

...

- (iii) in the case of capital expenditure to which paragraphs (c), (d), (e) applies, to twenty per cent, of such expenditure.”

The Commissioner refused to allow the investment allowance. The company appealed and the High Court held that the company was entitled to the investment allowance. From that decision the Commissioner appealed to this court.

Mr. Muli for the Commissioner urged two points. The first was that the business of the company comprised one trade of husbandry, that the capital expenditure in question was incurred for the purposes of husbandry and deductible under para. 25, and that para. 27 only applies to expenditure for a separate trade the activities of which do not form part of a larger business. The second was that if the expenditure

was incurred for a trade to which para. 27 applies, then under para. 25 (3) (*b*) such expenditure would “serve partly the purposes of husbandry

and partly other purposes” with the result that it then fell to the Commissioner to determine what just and reasonable proportion of the expenditure should be deducted under para. 25.

Dealing with the first point, I was in considerable uncertainty for some time before coming to a definite conclusion. I should first, I think, dispose of one aspect of the matter. As the company would be entitled under para. 25 to deduct over a period of five years all the capital expenditure it had incurred and as it was claiming in addition the right to deduct a further twenty per cent, under para. 27, the result would be that the company, if its claims were correct, would deduct more capital expenditure than it had in fact incurred. This, on the face of it, would be an extraordinary result; and the courts lean against any construction of legislation which leads to an extraordinary result unless it is quite clear that the legislature intended that the extraordinary result might arise in certain cases. This matter, however, is dealt with in para. 32 of the Second Schedule in which provision is made for the prevention of double allowances, but there is a proviso which specifies that the paragraph shall have no application to an investment deduction. It is thus clear that the legislature envisaged the possibility of double deductions in respect of the same expenditure. In these circumstances I do not consider that the extraordinary result which would eventuate if the company’s claim is correct should have any influence on the interpretation of the provisions of para. 27 taken in conjunction with para. 25.

Before a person is entitled to an investment allowance under para. 27 (c) or (e) in respect of capital expenditure, whether that expenditure be on the construction of an industrial building or the purchase and installation of machinery in a building, the capital expenditure must be “for the purpose of a trade” of a certain specified nature. If the nature of the trade as specified consists of activities which form part of a larger business carried on by the same person, can it be said that that person is carrying on that trade? For example, if a person is carrying on the business of husbandry for the purposes of which he ploughs his land by tractor, can it be said that he is also carrying on the trade of ploughing by mechanical means? It is clear that if his only occupation is hiring out tractors for ploughing, then he is carrying on the trade of ploughing by mechanical means. It is, I think, also clear that if he carries on this trade as a separate activity from his other trades or businesses, it can be said that he is carrying on the trade of ploughing by mechanical means no matter what other businesses or trades he may also carry on. But, in my view, if the activities of a person form an integral part of a larger trade or business carried on by him as one integrated business, that person cannot be said to be carrying on, not only the larger trade of business, but also the multifarious trades which could be attached to each of the various activities which form an integral and integrated part of the larger trade or business. It must not be forgotten that every decision on income tax legislation has a reverse as well as an obverse side. If, for example, a tax were imposed on the trade of ploughing by mechanical means, surely it would not attach to a farmer who is carrying on the business of husbandry in the course of which, and for the purposes of which business alone, he uses his own tractor for ploughing. Equally well, any expenditure incurred on the tractors cannot be said to be expenditure incurred in the trade of ploughing by mechanical means.

In this case the company has accepted that it is carrying on one business, the growing and preparing for the market of tea. That business is the business of husbandry and expenditure therein is for the purposes of husbandry. An integral and integrated part of that business is the processing of the green tea leaf into made tea. I cannot see that the company can be said in those circumstances to be carrying on the trade of the subjection of materials of local origin to any process merely because that activity forms one part of the many other activities

which in conjunction form one business of husbandry carried on by the company. In different circumstances, for example, if the company carried on its processing activities in the factory quite separate from its growing activities, the company might be said to be carrying on the trade of processing local material; but that is not the position in this case. As I have already pointed out, unless the company is carrying on the trade of subjecting materials of local origin to any process, it will not be entitled to an investment allowance under para. 27. In my view, it is not carrying on any such trade; and the first point urged by Mr. Muli on behalf of the Commissioner is correct. It is, therefore, unnecessary to consider the second point.

For these reasons I would allow the appeal with costs and set aside the judgment and decree of the High Court and substitute therefore a judgment and decree dismissing the appeal to the High Court with costs and confirming the assessment. As the other members of the court agree it is so ordered.

Spry JA: I have had the advantage of reading in draft the judgment of my Lord the President, with which I respectfully agree. It seems to me that this appeal really turns on the meaning of the words “consists in” as used in sub-paras, (c) and (e) of para. 27 of the Second Schedule to the East African Income Tax (Management) Act 1958. I have not found this easy to decide. If “consist in” could be equated with “comprises”, the respondent company would, I think, be entitled to succeed. I think, however, that Mr. Muli’s contention is correct and that “consist in” has an exclusive meaning. I note that The Shorter Oxford English Dictionary defines “consist in” as “to have its being in; to be comprised or contained in”. That is the reverse of comprising. I think, therefore, that the respondent company, whose trade is that of growing and processing tea, is not entitled to deductions under para. 27 (c) and (e), to which it would have been entitled had its trade been exclusively that of processing tea.

I accordingly agree that this appeal should be allowed.

Sir Clement De Lestang V-P: I agree.

Appeal allowed.

For the appellant:

MG Muli (Deputy Counsel to the East African Community)

Counsel to the East African Community

For the respondent:

JA Mackie-Roberston, QC and JA Couldrey

Kaplan and Stratton, Nairobi

Official Receiver v Aggarwal [1968] 1 EA 468 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	28 October 1967
Case Number:	20/1965 (99/68)

Before: Platt J
Sourced by: LawAfrica

[1] Bankruptcy – Partnership – Bankruptcy of one partner – Whether effect is to dissolve the partnership – Indian Contract Act 1872, s. 254; Bankruptcy Ordinance, s. 38 (6) – Law of Contract Ordinance, s. 213 (T.).

[2] Limitation – Bankruptcy – Partnership – Action for account – Whether barred by Limitation Act, art. 106 (T.)

[3] Partnership – Bankruptcy of one partner – Whether effect is to dissolve the partnership – Indian Contract Act 1872, s. 254; Bankruptcy Ordinance, s. 38 (6); Law of Contract Ordinance, s. 213 (T.).

Editor's Summary

The plaintiff, as trustee for a bankrupt, brought this action for an account and a share of the profits and assets of a partnership created in 1952 in which the bankrupt had been a partner. The defendant took a preliminary point that the suit was barred under art. 106 of the Limitation Act because it had not been brought within three years from the date of dissolution of the partnership. The plaintiff claimed that the defendant and the bankrupt were in partnership until the partnership was terminated by the Official Receiver by notice dated July 16, 1965. The act of bankruptcy occurred on October 14, 1960 and the receiving order was made on April 28, 1962. The defendant argued that the partnership was dissolved either from the date of the act of bankruptcy or the date of the receiving order in terms of s. 213 of the Law of Contract Ordinance. Alternatively, the defendant relied on s. 38 (6) of the Bankruptcy Ordinance which provides for the distribution of the joint estate in the event of the bankruptcy of one or more partners.

Held –

- (i) the Law of Contract Ordinance did not come into effect until March 31, 1961 and could not therefore affect a partnership created in 1952;
- (ii) section 254 of the Indian Contract Act 1872 applied; but that section only gives to the partners the right to come to court to seek dissolution and does not dissolve the partnership apart from any agreement between the partners;
- (iii) section 38 (6) of the Bankruptcy Ordinance does not imply an automatic dissolution of the partnership;
- (iv) the dissolution of the partnership dated from the notice given on July 16, 1965 and the suit was therefore not statute-barred under art. 106 or the residuary art. 120 of the Limitation Act.

Preliminary objection overruled.

No cases referred to in judgment

Judgment

Platt J: The defendant has taken a preliminary point in this case that the suit is barred by art. 106 of the Limitation Act, since it was not brought within three years of the date of the dissolution of this partnership. Therefore, it is claimed that the suit should be dismissed. This matter was not pleaded but it is common ground that the point may be raised now and that indeed this court is bound to reject the plaint if the point is sustained.

According to the plaintiff the defendant and the bankrupt Kishan Singh Sandhu were in partnership carrying on business under the name of the Arusha Chini Jaggery Estate from 1952 on the basis of a verbal agreement. By a notice dated July 16, 1965, served upon the defendant, the Official Receiver, as trustee in bankruptcy for Sandhu, terminated the partnership. There was provision in the agreement for termination in this manner.

The act of bankruptcy occurred on October 14, 1960, as it would appear from the record of the bankruptcy proceedings which was inspected under O. 13, r. 10. The receiving order was made on April 28, 1962, and Sandhu was adjudicated bankrupt on June 13, 1962.

Under art. 106 two matters had to be shown (1) that the suit was for an account and a share of the profits of a dissolved partnership, and (2) the date of the dissolution.

On the first point the plaintiff claims in para. 9 of the plaintiff:

- (a) that accounts be taken;
- (b) judgment and decree against the defendant for payment of the sum found due to him after accounts are taken.

Although the plaintiff claimed that he had only asked for an account, it seems quite clear that he had asked for his share, i.e., whatever was due to him after the account had been taken. It was said that all that was at stake was a certain sum lying in court awaiting distribution. Whether this sum is profits or capital, it still comes within art. 106 as the defendant submitted. The article covers a suit for a partnership account and recovery of the plaintiff's share of the assets and property of the partnership business (see Rustomji's Commentary (4th Edn.), "The Law of Limitation" at p. 537). In my view this is a suit for an account and a share of the profits or assets of the partnership.

On the second point, the plaintiff relied on the date of the notice of dissolution as being the effective date of dissolution. If that is so, the suit having been filed on August 18, 1965, i.e., in the month following the notice, the suit is within time.

The defendant, however, argues that the partnership was dissolved from the date of the act of bankruptcy, or at least the date of the receiving order. Counsel relied upon s. 213 of the Law of Contract Ordinance (Cap. 423), which provides as follows:

- "213 (1) Subject to any agreement between the partners, a partnership is dissolved as regards all the partners by the death or bankruptcy of any partner."

So it was said that as no agreement to continue the partnership after the act of bankruptcy had been pleaded, it must be presumed that the bankruptcy had dissolved the partnership. The difficulty was that as this Ordinance had only come into effect on March 31, 1961, could it be said to affect this partnership created in 1952, when one partner had become bankrupt in 1960?

Section 227 of the Law of Contract Ordinance provided that the Indian Contract Act of 1872 should cease to extend or apply to Tanganyika; but s. 228 made the following provision:

- "228 (1) Notwithstanding the provisions of s. 227, the Indian Contract Act 1872, as heretofore in force in Tanganyika shall continue to apply to any agreement made, contract entered into, or transaction effected before the commencement of this Ordinance in any case in which it would have applied prior to the commencement of this Ordinance."

The agreement and contract had, of course, been made and entered into prior to 1961. Some argument was addressed to the court as to the meaning of “or transaction effected”. To my mind that phrase pertains to the creation or performance of some contractual relationship. If it should refer to the act of bankruptcy, then that was also before 1961. In my view therefore it is to the provisions of the Indian Contract Act that I must look to ascertain the effect of the bankruptcy of Sandhu upon the partnership.

Section 254 of the Act of 1872 provides:

“254 At the suit of a partner the court may dissolve the partnership in the following cases:

- (1) . . .
- (2) When a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors.”

It is clear that the mere act of bankruptcy only gives to the partners of the bankrupt the right to come to the court and seek dissolution. It did not, as in the new act, dissolve the partnership, apart from any agreement between the partners. On the basis of the 1872 Act, therefore, the act of bankruptcy did not dissolve the partnership in this case.

But then the defendant argued that the dissolution was implicit from the terms of s. 38 (6) of the Bankruptcy Ordinance (Cap. 25). That section provides as follows:

“38(6) In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates, it shall be dealt with as part of the joint estate. If there is a surplus of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.”

Relying upon the Commentary to s. 33 (6) of the English Bankruptcy Act 1914 in Williams on Bankruptcy (16th Edn.) at p. 218, the submission is that such an application can only mean that the partnership has been dissolved. Therefore, either the Bankruptcy Ordinance fills up a gap in the Contract Act of 1872 which is silent in the matter of the bankruptcy of one partner, or if these Acts are in conflict, then the Bankruptcy Act, being the latest, must prevail.

Now the English law provides that the bankruptcy of one partner has the effect of dissolving the partnership. Therefore, the commentary to s. 33 of the English Act proceeds upon that footing. Section 38 of Cap. 25 provides for the priority of payment of debts. It would appear to assume that the bankruptcy of one partner had caused the dissolution of the partnership in order that the assets could be applied according to that priority. But it does not necessarily mean that the bankruptcy of one partner in fact dissolved the partnership. No doubt before the assets could be distributed, the trustee in bankruptcy would have to take steps to see that the partnership was dissolved. He could do so by giving notice in this case, or he could apply to the court under s. 254 of the Act of 1872. Having then dissolved the partnership, the trustee or the solvent partner could apply the assets. In my view it would be wrong to assume that s. 38 (6) implied an automatic dissolution of the partnership.

Accordingly I would hold that the dissolution of this partnership dated from the notice given on July 16, 1965, and that therefore the suit was not barred under

art. 106 or the residuary art. 120 which was also put forward. It follows that the suit should go forward to trial.

Preliminary objection overruled.

For the plaintiff:

A Reid

Reid & Edmonds, Moshi

For the defendant:

DN Khanna and B Gossain

Khanna & Co, Nairobi

Tarmal Industries Ltd v Commissioner of Customs and Excise [1968] 1 EA 471 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam; Court of Appeal at Dar-Es-Salaam
Date of judgment:	16 September 1967
Case Number:	32/1967 (30/68); 57/1968 (61/68)
Before:	Georges CJ, Sir Charles Newbold P, Duffus and Law JJA
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[1] *Customs – Admission of article duty-free – Effect of admission of substance duty – free as “chemical” under Customs Tariff Ordinance, First Sched., item 108 (K.) (T.) – Whether substance can subsequently be classified as dutiable – Whether admission has effect of delegated legislation – Whether final and binding.*

[2] *Customs – Estoppel – Whether erroneous exemption of substance from import duty creates an estoppel against the Commissioner of Customs and Excise – East African Customs Management Act 1952, s. 105.*

[3] *Customs – Import duty – Soap – Whether substance comprising sodium salts of fatty acids is soap and subject to duty – Customs Tariff Ordinance, First Sched., items 105 and 108 (T.), (1).*

[4] *Customs – Limitation – Demand for payment of import duty, if not made within twelve months – East African Customs Management Act 1952, s. 118, proviso.*

[5] *Estoppel – Customs – Whether incorrect admission of substance as duty free chemical and importation of it acting on this assurance can create estoppel against the Commissioner of Customs and Excise.*

Editor's Summary

The defendant/appellant company used to import into Tanzania caustic alkali and fatty acids in metal drums but due to corrosion of the drums there was deterioration of the fatty acids resulting in discolouration of the end product, namely soap, which the company manufactured from this substance in Tanzania. To overcome this difficulty the company decided to use a substitute, namely sodium salts of fatty acids in pellet form packed in plastic or paper packages. This substance was originally described by the suppliers as “washing soap in noodle form”, but the company required the description to be altered to “sodium salts of fatty acids”. A sample of the pellets was sent to the Commissioner of Customs and Excise for examination, and he was asked to rule whether the substance might be imported duty free under tariff item 108 (*h*) of the First

Schedule to the Customs Tariff Ordinance of Tanzania. Chemicals were free of duty if “admitted as such by the Commissioner” under that item. On May 15, 1965, the Commissioner ruled (apparently without making any analysis) by letter to the company that sodium salts of fatty acid pellets were duty free; and on June 18, 1965, a General Notice to this effect was published in the *Tanzania Gazette*. By a subsequent letter of July 15, 1965, the Commissioner again confirmed his ruling. Acting on this assurance the company ordered a large quantity of the pellets, which were imported duty free between November, 1965 and October, 1966. At the end of October, 1966, an investigating officer of the customs took a sample of the substance and it was tested by the Government Chemist. As a result the company’s customs agent was informed that the substance was after all liable to duty under tariff item 105 of the First Schedule to the Ordinance: “soap, soap powders, soap extracts and substitutes therefore n.e.s.” In due course the Commissioner claimed the sum of Shs. 1,939,499/- from the company as customs duty payable on the substance imported between November, 1965 and October, 1966; and there were further consignments upon which duty would fall to be paid if the company was liable to pay it. Under protest, the company paid duty for one consignment but refused to pay the duty claimed in these proceedings. There were two main issues raised: (i) was the substance “soap” as defined under tariff item 105 quoted above and therefore dutiable? (ii) if the substance was “soap”, was the Commissioner estopped from claiming against the defendant the duty which should have been paid but for the erroneous exemption?

Held – in the High Court (Georges, C.J.):

- (i) although the substance was not an efficient cleansing agent, and the manufacturing or finishing process of the defendant was required to produce a more efficient end product, the substance could reasonably be classified as “soap” having regard to the definition of soap in Webster’s Dictionary and to the wording of tariff item 105 in the First Schedule to the Customs Tariff Ordinance;
- (ii) even if the substance could be classified both as “soap” and as “sodium salts of fatty acids”, under s. 105 of the East African Customs Management Act 1952 the goods had to be classified by the Commissioner as dutiable;
- (iii) although in normal circumstances the doctrine of estoppel would apply, there is no estoppel against a statute; and although the Commissioner initially erred in deciding the substance was not dutiable and possibly was negligent not to have analysed the sample sent by the defendant for examination, under s. 118 of the East African Customs Management Act 1952 the Commissioner was bound to correct the matter and levy duty on the basis that the substance had always been dutiable.

Judgment was given for the Commissioner for the amount claimed, less an amount which was not correctly demanded within twelve months from the date duty should have been levied under the proviso to s. 118 of the East African Customs Management Act 1952.

Cases referred to in judgment:

- (1) *Maritime Electric Co. Ltd. v. General Dairies Ltd.*, [1937] 1 All E.R. 748.
- (2) *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.*, [1961] 2 All E.R. 46.

Judgment

Georges CJ: delivered the following judgment of the High Court of Tanzania:

In this case, the Commissioner of Customs and Excise is claiming the sum of Shs. 1,939,499/- from the defendant company as customs duties shortpaid on

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packages of a substance imported by the company into Tanganyika between November, 1965 and October, 1966 and described as “sodium salts of fatty acids”. I am told that the defendant company has already paid duty, under protest, on one particular consignment of the substance, while further consignments are now in customs warehouses awaiting a decision in this case. In all, the financial stake is in the region of Shs. 2,500,000/-.

The fundamental issue is whether this substance described as “sodium salts of fatty acids” can reasonably be classified as “soap”, within the meaning of item 105 of the First Schedule of the Customs Tariff Ordinance (Cap. 346). If it cannot be so classified, then the Commissioner fails, and it may be well to consider this aspect of the matter first.

The substance has been analysed by the Government Chemist, Mr. Khomo, and the accuracy of his findings has not been challenged. The evidence establishes, however, that the method used by the customs investigating officer, in taking the sample to send to Mr. Khomo for analysis, was unscientific. The investigator merely dipped into a bag containing the substance which lay at the defendant company's premises, took out a certain quantity, placed it in an envelope, sealed it and carried it away. From this envelope, he sent samples at various times to the Government Chemist for analysis. Dr. Grant, who gave evidence for the defendant company, has described the proper method for taking samples in circumstances such as those obtaining in this case, and I accept his evidence on this point.

Three samples were analysed at the request of the Commissioner, and the results of these analyses are set out in letters dated November 5, 1966, marked P.7; December 12, 1966, marked P.2; and August 5, 1967, marked P.1. One test was carried out on a sample submitted by the defendant company, and the results are set out in the letter dated November 10, 1966, marked P.5. There was no evidence as to how the sample for this particular test was taken, but since the defendant company was itself doing the sampling, it is not unreasonable to presume that it would not be done in any manner prejudicial to its own interests. This sample, at least, can be taken as likely to be representative.

Admittedly, the substance is not homogenous, and it would appear whatever the method of sampling, that results would vary. In the sample submitted by the defendant company, the percentage of true soap in the sense defined by Mr. Khomo was 80.2 per cent. The amount of water was 16.6 per cent. Total fatty matter was 73.2 per cent., sodium oxide 8.4 per cent., free fatty acid 1.4 per cent, and matter insoluble in alcohol 0.23 per cent. None of the samples showed less than eighty per cent, true soap as defined above. The highest percentage of free fatty acid was 3.4 per cent, in the sample reported on December 12, 1966, and the lowest 0.4 per cent, in the sample reported on August 5, 1967.

While the method of taking the samples was clearly unscientific, I am satisfied that the analyses submitted in evidence give a fair range of the chemical composition of the substance. This is a civil case, to be decided on the balance of probabilities, and the defendant company has not submitted any results showing that a significantly different analysis could be obtained had there been proper sampling.

It has been suggested that there are three possible approaches which could be used in arriving at a definition of soap within the meaning of item 105 of the First Schedule of the Customs Tariff Ordinance. The term could be defined in its strictly chemical sense; it could also be defined in what is termed its common chemical sense; and, finally, in its commercial sense as what has been termed soap of commerce.

Dr. Grant has defined soap in the chemical sense as a salt of one or more of the higher fatty acids with an alkali or a neuter. This generic term will cover not

only the soluble salts, but the insoluble salts as well. Mr. Khomo's view was different. He testified that soap was not a term of art in chemistry, though he admitted that salts such as magnesium stearate, calcium stearate and zinc stearate could be called "specialised soap". When it was suggested to him that they were nonetheless soaps in the chemical sense, his reply was that they were not in the common English use of the word.

It would appear, therefore, that the difference in point of view is more apparent than real, and I accept the definition given by Dr. Grant as being the proper definition of soap in the chemical sense. I am satisfied that this is not the sense in which the word is used in the schedule to the Customs Tariff Ordinance. It is not the sense in which the businessman would understand it, and the Ordinance is clearly one designed to affect the transactions of business people in their relations with the Customs and Excise Department.

The second method of definition suggested is the common chemical definition. In my view, it is dangerous to speak of a common chemical definition. If a chemical is to be adopted at all, it should be a proper chemical definition, as chemistry purports to be a science of much exactitude. To speak of a common chemical definition is to create a concept which may be understood neither by the layman nor the scientist and cause confusion. This, I think, is apparent in the evidence of Mr. Khomo.

The third method of definition suggested is that of Dr. Grant. He suggested that soap should be defined as the soap of commerce, that is an article which could be bought and sold as soap in the commercial world. In short, that the difference between a soap of commerce and a chemical soap was that a soap of commerce was a soap which was suitable for commercial use. With respect, this hardly strikes me as being a definition at all, and indeed Dr. Grant was forced into the position where he admitted that using that method, one was in fact defining soap by saying that it was soap.

I am particularly attracted by the definition of soap contained in Webster's Dictionary, which reads as follows:

"A cleansing agent made by action of an alkali and fat and consisting essentially of sodium salt of fatty acid."

This emphasis on soap as a cleansing agent seems to me eminently correct. It is the sense in which the word is commonly understood by businessmen and ordinary people. The limitation introduced by description of the process of manufacture and the specification of the main chemical ingredient help to separate soap as a cleansing agent from other cleansing agents differently constituted. It should be noted that item 105 reads:

"Soap, soap powders, soap extracts and substitutes therefore n.e.s."

A substitute is something used instead of an original article in an attempt to obtain the identical effect which could have been obtained had the original article been used. The fact that soap substitutes are included in the item would indicate that soap in the section was meant to be understood in its ordinary sense, as a cleansing agent, and that the substitutes were meant to be functional substitutes able to perform the tasks which soap performs, that is acting as a cleansing agent. It would appear indeed that any substance, whatever its chemical composition might be, which could be used as a cleansing agent would fall under item 105.

Unfortunately very little of the evidence before me was directed to establishing whether or not the substance imported by the defendant company was indeed a cleansing agent. It was established that it consisted essentially of sodium salts of fatty acids. From any point of view, a substance which is made up

of at least

eighty per cent, of sodium salts of fatty acids can be said to consist essentially of sodium salts of fatty acids. Mr. Khomo testified that he washed his hands with the substance, that it produced lather, acted as a cleanser and it appeared satisfactory. There was no evidence on the other side indicating that the substance was not in fact satisfactory as a cleansing agent. There was much evidence directed to show that it could be deduced from its chemical composition that it could not be an efficient cleansing agent.

Cardinal to the case for the defendant company was a citation from a work by Davidsohn, entitled "Soap Manufacture". This book is part of a general series known as "The Fats and Oils Series". At p. 414 of this book, it is stated that soap when used alone has to perform five functions in the laundry process:

1. Neutralise the acid of the soiled washing;
2. Neutralise the acid of the water used;
3. Neutralise the acid of the fabric itself;
4. Precipitate the hardness of the water;
5. Act as a detergent, that is emulsify and keep in suspension the fatty and solid particles.

It would appear that during the whole washing process, the soap solution should maintain an optimum alkalinity of pH 10.7 to 11.2.

At the end of the first day of hearing, Mr. Khomo conducted an alkalinity test on the samples in his possession and obtained results showing a pH of 9.9 to 10.0. I am in no doubt that the substance imported by the defendant company would not be as efficient a cleansing agent as the end product into which it is manufactured in the defendant company's factory. Indeed, it is clear from Dr. Grant's evidence that pure sodium salt of fatty acid would itself be less efficient as a cleanser than many products marketed today containing a lower percentage of sodium salt of fatty acid. In its factory, the defendant company adds a number of chemicals to the imported substance, among them caustic soda to neutralise the free fatty acid and increase the alkalinity; optical bleach which helps to create the impression generally described in the advertisements of making "white seem whiter"; citronella which helps to impart a pleasant odour; and carboxine ethyl glycerine which apparently helps in the detergent process. The amount of true soap, as defined by Mr. Khomo, in the end product is 88.32 per cent.

The main fault which can be found with the substance as a cleansing agent is the presence of free fatty acids as an ingredient in its composition. The effect of this free fatty acid is to reduce the alkalinity of the solution, so that some of the alkaline strength which should normally be used to perform the functions in Davidsohn's work as outlined above will be used up instead in neutralising the free fatty acid in the solution. It has also been stated, and I accept it, that the presence of free fatty acid will lower the keeping qualities of the soap and cause it to go rancid within a shorter time than would have been the case had there been no free fatty acid.

On the evidence before me, it would appear on a balance of probabilities that the substance is a cleansing agent and could be used as such. It would not be as efficient a cleansing agent as the product manufactured by the modern methods in use in the defendant company's factory.

Dr. Grant in his evidence stated that in his opinion, had the substance been marketed in the rural areas of Tanganyika, the less sophisticated housewife might, if the price were attractive enough, purchase it on perhaps two occasions, but no more. In Dar-es-Salaam, he thought that no matter what the price, the housewife would not in fact purchase the substance more than once. From his answers, it is plain that Dr. Grant has carried out no market research in this country, and has no real knowledge of the workings of

the mind of the average

Tanzanian housewife, sophisticated or otherwise. It would be fair to say that fundamentally he was of the view that the substance was not soap within the meaning of item 105, because it did not comply with the British specification for hard soap.

It should be noted en passant that a substance made up of 100 per cent, sodium salts of fatty acids would comply with the British specification but would not in fact be as good a cleansing agent as the products normally sold on the market.

Mr. Khomo, on the other hand, pointed out that the substance did comply with the specification set out by the Central Tender Board for the guidance of suppliers wishing to tender for the Government's requirements in soap. This specification provides no maximum quantity for free fatty acid. Indeed, Mr. Khomo thought that the substance was a high grade laundry soap because its content of true soap as defined by him was higher than that required by the specification.

On the other hand, a document was put in which set out a specification suggested by the Ministry of Health as the minimum necessary for any substance sold on the market as soap. This specification does contain a maximum for the free fatty acid content in laundry soap. This is 0.4 per cent. Only one sample tested by Mr. Khomo showed as low a free fat content as 0.4 per cent. One was as high as 3.4 per cent, and the two others were 1.4 per cent, and 1.2 per cent.

Dr. Grant stated that the pellets had a highly rancid smell, and for that reason would not comply with the Central Tenders Board specifications which state that the soap shall be free from objectionable odour. Mr. Khomo's opinion was that the substance did not in fact have an objectionable odour and that it was not rancid. I have myself examined the substance and, while not laying claim to a highly developed sense of smell in such matters, I would not myself describe the smell of the substance as highly rancid.

The suggested specifications of the Ministry of Health lay down three grades. In grade 1, the total fatty matter should be not less than seventy per cent; In grade 2, not less than sixty per cent.; and in grade 3 not less than fifty per cent. So that, while there is an excess of total free fat in the samples, the total fatty matter contained is much higher than that required by the specifications.

I would mention in passing that the goods when first invoiced to the defendant company by the manufacturers in Russia were described as "Washing Soap in Noodle Form". Subsequently, the office of the Soviet Trade Counsellor advised the defendant company that the literal translation of the Russian term "myljnoi massy" was "soapy mass". In subsequent invoices, at the request of the defendant company, the substance was described as "sodium salts of fatty acids".

On a consideration of all the evidence, I would conclude, therefore, that the substance does fall within the item "soap" in the Schedule to the Customs Tariff Ordinance. It consists essentially of sodium salts of fatty acids, and I am satisfied that it can be used as a cleansing agent, although it would not be as efficient as the end product of the defendant company's manufacture, because of its lower alkalinity. On the other hand, it appears to satisfy the standards laid down by the Central Tenders Board. Although its free fatty acid content is generally too high to meet the standard suggested by the Ministry of Health, the fact is that its total fat content is well in excess of that specified, particularly for the third grade of soap under these specifications. There is no positive evidence of a quantitative character as to the scale of the loss of efficiency as the total free fatty acid content goes up, but there is nothing on the evidence before me either to show that the substance could not, because of its free fatty acid content, act as a cleansing agent. In arriving at this conclusion, I have ignored the evidence given by Mr. Tarmal of the defendant company of the processes to which this substance is subjected before his brand products are turned out.

The purpose of the evidence, no doubt, was to imply that anything which already could be described as soap would not need

to be treated in this way to make it commercially marketable. Logically, of course, the argument does not follow. It is clearly possible to process a less efficient soap so as to obtain a highly efficient brand product, and this, in my view is what the defendant company does. It is not so much a manufacturing process as a finishing process.

I have also been referred to the Brussels nomenclature. The term soap appears under item 34.01, and reads:

“This heading covers the normal soaps of commerce. They are prepared by the saponification of fats and oils usually with sodium hydroxide or potassium hydroxide, or by the neutralisation of fatty acids with these alkalis or with ammonia or triethanolamine, thus producing the soluble salts of the higher fatty acids (palmitic, stearic, oleic, etc.).”

It should be noted that the defendant company in this case does not prepare their soap by the specification of fats and oils with sodium hydroxide or potassium hydroxide, nor by the neutralisation of fatty acids with those alkalis or with ammonia. The product which they import has already reached that stage. All that is needed is the neutralisation of the comparatively small amount of free fatty acid still remaining in the product.

There is another heading, 29.14 – Monoacids and their anhydrides acid peroxides and peracids, and their halogenated, sulphonated, nitrated or nitro-sated derivatives. Sub-heads (VI) and (VII) of that group cover palmitic acid and stearic acid and their salts. There is a note to the section which reads:

“The water-soluble palmitic salts (e.g., sodium potassium and ammonium palmitates) are soaps but they remain classified in the present heading.”

It is urged that I should pay great attention to this system of classification, which is used or cover perhaps seventy per cent, of all international trade, and that there would appear to be drawn a distinction between soap of commerce and the chemical substance of which essentially it is composed.

As I have indicated earlier, the term “soap of commerce” is itself incapable of definition, except by demonstration. The substance here was sold as “washing soap in noodle form” or “soapy mass”. It could clearly be used as a cleansing agent. The argument really is that the substance is sodium salts of fatty acids with impurities, and therefore ought to be classified under 29.14 rather than 34.01. Section 105 of the East African Customs Management Act 1962, provides:

“Where any goods can reasonably be classified under two or more names, classes, or descriptions, with the result that there is a difference in the liability to duty, or in the duty to which such goods are liable then such goods shall be classified under the name, class or description which results in such goods being liable to duty or being liable to the higher or highest rate of duty applicable, as the case may be.”

At the very highest, it would appear to me that the substance could be classified both as soap and as sodium salts of fatty acids. If such was the case, then there is a duty on the Commissioner to place it in the classification which would attract the highest rate of duty.

It is necessary now to consider some of the history of this matter, in order to deal with two further defences. The defendant company had been importing caustic alkali and fatty acid in drums and generally carrying out the process of neutralisation here to manufacture soap. There had, however, been some difficulty over the containers. The free fatty acid would corrode the metal drums in which it had been shipped and this would cause a deterioration of the acid which adversely affected the colour of the soap produced. The evidence is that the defendant

company experimented at some length to solve this problem, but failed to do so. Eventually, at a trade exhibition here, they met a Russian expert and soap manufacturer with whom they discussed the matter through an interpreter, and it was then that the substance which subsequently they imported was mentioned as a possible solution. This substance could be imported in plastic bags or paper packages, and there was no problem of storage. At an early stage, the defendant company appreciated that there might have been problems about the duty-free importation of the substance. Accordingly, they got in touch with the Commissioner of Customs and Excise to have a ruling on the matter.

Considering that the defendant company are experts in the business of soap, with many years experience, it could be said that their letter to the Commissioner was less than frank. It read as follows:

“The Commissioner of Customs & Excise,
P.O. Box 9061,
MOMBASA

28th April, 1965

Dear Sir,

We import tallow fatty acids and caustic soda for the manufacture of soap in our factory, and have to store large quantities of acids for several months in order to meet our requirements.

Owing to the corrosive effect of acids on metal the drums are eaten up and start leaking. Secondly, the acids react with metal drum, thus changing the original colour, with the result that our end-product are of dark colour. Finally, the handling of acids from leaking drums is a cumbersome task for the workers.

We wrote to our suppliers about the difficulties encountered, and to suggest methods to overcome them. They have suggested that if we were to import the sodium salt of the fatty acid in the form of pellets then the above difficulties could be overcome, as the pellets could be shipped in polythene lined bags or paper bags, thus avoiding the corrosive action of the acid.

We are enclosing herewith samples of pellets for your examination, and shall be pleased to have your comments about importing pellets under tariff item 108 (k). We shall be pleased to supply any other information that you may require.

Thanking you,

Yours faithfully,

Tarmal Industries Limited.”

There is no mention of the fact that the substance being imported had in fact been described by the suppliers as washing soap in noodle form; nor is there any mention of the fact that sodium salts of fatty acids was the principal ingredient of soap in any event. Of course, the defendant company cannot be completely blamed because they did in fact send the samples to the Commissioner and a test could very well have revealed that the substance could be classified as soap. There is no evidence whether any such test was conducted, and it is doubtful whether it was. There is, however, reason to believe that had such a test been conducted by Mr. Khomo, he would have concluded that the substance was a high grade laundry soap. At the time of writing this letter, the defendant company had placed an order for ten tons of the substance, subject to their obtaining permission to import it free of duty and subject to their being able to use it in their plant to manufacture the product which they wished to manufacture.

The Commissioner of Customs and Excise, Mombasa, replied to the defendant company by letter dated May 15, 1965, stating:

“With reference to your letter dated April 28, 1965, you are advised that sodium salt fatty acid pellets may be imported free of duty under tariff item 108 (k).”

On July 2, 1965, there appeared in the *Gazette* of the United Republic of Tanzania a list of articles which could be imported free of duty under tariff item 108 (k), and among them was sodium salt fatty acid pellets. The defendant company had by then conducted a number of experiments and had turned out a certain number of products which they had sent to the Government analyst for testing. These samples all showed an excess of free caustic alkali. That fault was apparently corrected and by August 9, 1965, the Government Chemist reported that the Minara washing soap sample submitted complied with Government specifications for washing soap. It would appear that the specifications used were those suggested by the Ministry of Health. Thereupon the defendant company placed an order for some 2,400 tons of the substance. Between the months of October, 1965 and November, 1966, as set out in the particulars to the plaint, consignments in fulfilment of that order arrived.

On or about October 28, 1966, Mr. Mehta, a senior investigating officer of the Customs and Excise Department, went to the defendant company’s premises to take a sample of the product for investigation. There has been no evidence as to what led to the change of mind on the part of the Customs and Excise Department. After the test by Mr. Khomo, a letter of demand was sent to Messrs. J. P. Patel & Co., customs agents for the defendant company. This letter read as follows:

“Sodium Salt Fatty Acid Pellets

I refer to your duty free importation of the above goods and have to advise you that these pellets are liable to duty under T.I. 105. You are therefore requested to lodge post-import duty entries and pay the duty due without delay. I append below the necessary details.”

There follow the particulars of the entry numbers and dates, the value of each consignment and the duty allegedly due.

By a reply dated November 7, J. P. Patel & Co. on behalf of the defendant company, quite understandably, protested that it was most unreasonable to classify the goods now under T.I. 105 when their clients had, prior to importation, obtained the specific ruling of the Commissioner of Customs that the goods would be classified as a genuine chemical and therefore free of duty under tariff item 108 (k). There was a further letter dated November 18, 1966, from the commissioner regretting that the demand of duty which he made earlier was erroneous and setting out what he claimed was the correct amount due. Subsequently, on December 23, there appeared in the *Gazette* of the United Republic of Tanzania a notice placing the item “Sodium Salts of Fatty Acids (Soap)” under tariff item 105.

On the basis of these facts, the defendant company urges that the plaintiff is estopped from claiming the duty which he says is due. They argue that the plaintiff did represent to them that the substance could be imported under tariff item 108 (k), and that acting on that representation they entered into a contract with the suppliers for the delivery of some 2,400 tons of the substance. They also state, which I accept, that in working out the costs of their manufactured products, they based their calculations on the assumption that the substance would be imported free of duty, and they state that they have in fact sold their manufactured products at a price based on that assumption, and that

if in fact they are called upon to pay the duty claimed in this case, they will suffer a loss equivalent to the amount of duty which they will be called upon to pay.

It has been argued on behalf of the plaintiff that there is no satisfactory evidence that the defendant company did act upon the representation of the Commissioner. It is urged that they are themselves experts in the matter, understood the situation thoroughly, knew that the substance they were importing could be classified as soap, failed to disclose the whole position to the Commissioner and so took their chance. I do not accept this argument. Had the defendant company not sent a sample of the substance to the Commissioner, there may have been some merit in the argument. The fact is they did send a sample and, to say the least, it was negligent on the part of the Commissioner not to have had the sample tested to arrive at an independent decision as to whether the substance was sodium salts of fatty acids or some other substance.

I am satisfied that the Commissioner made the representation. I am satisfied that the defendant company acted on that representation and that the Commissioner knew that they would have so acted. I am also satisfied that as a result of so acting, they would suffer loss if called upon now to pay the duty claimed by the Commissioner. In other words, I am satisfied that this is a case under which in normal circumstances the doctrine of estoppel would apply.

It is argued for the Commissioner that the doctrine does not apply, because the effect of its application would be to prevent him from carrying out a duty imposed upon him by statute. The principal authority cited in support of the proposition was *Maritime Electric Co. Ltd. v. General Dairies Ltd.* [1937] 1 All E.R. 748. In that case the plaintiff, a public utility company within the meaning of the Public Utilities Act of New Brunswick, sold and delivered electricity to the defendant company, which, to its knowledge, would be used by that company in the manufacture of certain of its products. The defendant company duly paid bills submitted by the plaintiff company for the amount of electricity which the plaintiff company stated that it had supplied. In fact over a number of months, the bills were erroneous in that the figures showing on the meters, which were working correctly, were not multiplied by ten as they ought to have been before calculating the charges. The plaintiff company sued the defendant company, claiming some \$1,900 being the difference in the amount actually paid over the period and the amount which ought properly to have been paid had the bills been calculated correctly. The defendant company argued that the plaintiff company should be estopped from claiming this amount, since it had in fact calculated the costs of its products on the basis of the bills supplied by the plaintiff company, had sold its products at a price fixed on that assumption and would suffer loss if called upon to pay the difference between what was stated to be the correct bill and the amount actually paid.

The Public Utilities Act which controlled the management of the plaintiff company provided in one of its sections as follows:

“No public utility shall charge, demand, collect or receive a greater or less compensation for any service than is prescribed in such schedules as are at the time established or demand, collect, or receive any rates, tolls, or charges not specified in such schedules.”

The purpose of this section was clearly to prevent differential charges to customers which would have the effect of giving preference to one over the other. The Privy Council held that the plaintiff was entitled to recover the sum claimed. If the plea of estoppel were allowed to succeed, then in effect the plaintiff company would be permitted to charge a rate less than that specified in the schedule at the relevant time, and this would be in effect a breach of the statutory obligation laid upon it.

It should also be noted that there was a penalty for the breach of that statutory obligation. Delivering the judgment of the court, Lord Maugham states, at p. 753:

“The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy, in a general sense. In such a case – and their Lordships do not propose to express any opinion as to statutes which are not within this category – where as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it. This conclusion must follow from the circumstances that an estoppel is only a rule of evidence which, in certain special circumstances can be invoked by a party to an action; it cannot, therefore, avail, in such a case, to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law.”

and later at p. 754:

“To collect the money due will, in one sense, cause loss or injury to the respondent company, to the extent of \$1,931.82. Their Lordships do not know, because the admission (No. 9 above) does not cover the point, whether to allow the estoppel will not leave the respondent company with an advantage, consisting of the difference between the sum of \$1,931.82 and the total amount by which the respondent company was led to increase its payments of cream to farmers and others. It is, however, clear that to disallow the estoppel will leave the respondent company out of pocket, to the extent of the increased amounts just referred to. It is an unfortunate result; but the obligation to obey a positive law is more compelling than a duty not to cause injury to another by inadvertence. In the present case, it may be observed that the injury is not a cause of action. Their Lordships are unable to see how the court can admit an estoppel which would have the effect pro tanto and in the particular case of repealing the statute.”

This case has been cited with approval in *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.*, [1961] 2 All E.R. at p. 46. In that case, the defendant company wished to buy a piece of land for use as a builders' yard. Certain premises which could be used as such came on the market, and the company wrote to the Corporation stating its intention to purchase for use as a builder's yard, pointing out that their understanding was that it had been so used for twenty years and asking whether this user would be permitted in future. The Corporation replied stating that there was an existing user as a builders' yard and that planning permission would not be required. On the faith of that representation, the defendant company purchased the premises. Some three weeks afterwards, the Corporation cancelled the permission for use of the premises as a builders' yard as there had in fact been a number of objections over the years on the ground that such user was harmful to the amenities of the district. They served upon the defendant a notice calling upon him to cease using the premises for that purpose. He argued that the Corporation were estopped from enforcing the notice by reason of the representation which they had made previously to him, on which he had acted, to his detriment. The Divisional Court quoted with approval the passage from the *Maritime Electric Co. Ltd.* case (*supra*) and stated ([1961] 2 All E.R. at p. 48):

“As I have said, I can see no logical distinction between a case, such as that, of an estoppel being sought to be raised to prevent the performance of a statutory duty and one where it is sought to be raised to hinder the exercise of a statutory discretion. After all, in a case of discretion, there is a duty under the statute to exercise a free and unhindered discretion. There is a long line of cases to which we have not been specifically referred which lay down that a public authority cannot by contract fetter the exercise of its discretion. Similarly, as it seems to me, an estoppel cannot be raised to prevent or hinder the exercise of the discretion.

. . . I have reluctantly come to the conclusion accordingly that the argument for the appellants is right, and that this appeal should succeed.”

In this case there is a statutory duty imposed on the Commissioner of Customs and Excise by s. 105 of the East African Customs Management Act 1952. It is the duty, where the goods can be reasonably classifiable under two or more names, classes or descriptions, to classify them under the name, class or description which results in such goods being liable to duty or being liable to the higher or highest rate of duty, as the case may be. If the substance here imported could be classified both under the heading soap, tariff item 105, and under the item chemicals not elsewhere specified such as may be admitted by the Commissioner under tariff item 108 (k), it would be the duty of the Commissioner to classify the substance under tariff item 105 which attracts duty, rather than under tariff item 108 (k) which does not. The fact that he failed to do so, on the authorities above cited, cannot estop him from carrying out his duty when he discovers the original error. Indeed, his earlier classification under item 108 (k) was in breach of s. 105 of the East African Customs Management Act. It was a breach of a statutory duty, and in that sense it was not lawful and estoppel cannot be raised against him to prevent him from correcting that act. Naturally one reaches such a conclusion with a certain measure of reluctance, as it is undoubtedly hard on the defendant company to be called upon so long after the event to find such a substantial sum, which would not have been payable but for the plaintiff's negligence in the first instance in not having the pellets which were sent to him for examination properly tested. One can well understand, however, that on the balance, it is preferable that the law should be as it is. It is not in the interests of consistent application of the law that errors should be sanctified as a principle. In any event, it should be noted that the final arbitrator of classification of any substance under the Act is the court and not the Commissioner, and to hold that the Commissioner is so estopped from claiming duty because of an erroneous classification on his part would in effect be making him to that extent the final arbitrator of classification and not the court as is clearly contemplated under the scheme of the Ordinance.

One other point remains for decision. Section 118 of the East African Customs Management Act 1952 reads as follows:

“Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was so short levied or erroneously refunded, as the case may be, were liable:

Provided that the proper officer shall not make any such demand after twelve months from the date of such short levy or erroneous refund, as the case may be, unless such short levy or erroneous refund had been caused by fraud on the part of the person who should have paid the amount short levied or to whom the refund was erroneously made, as the case may be.”

There is no allegation here of fraud and therefore it is clear that any demand for payment should have been made within twelve months from the date of such short levy.

The first entry set out in the particulars of the plaint is No. 336 November 4, 1965 and contained 13,333 boxes weighing 440,908.98 lbs. and valued at Shs. 205,150.25. The earliest demand from the Commissioner in respect of that entry is a letter dated November 1, 1966, which has already been quoted above. In that letter, however, the amount of duty claimed was wrong. It was stated to be Shs. 74,330/-. On November 18, another letter was written, as already indicated, regretting that the amounts of duty stated in the earlier letter were erroneously based on value, whereas a specific rate of duty applied on all the importations. The appropriate amount was then set out, being Shs. 248,012/-.

The second entry referred to in the plaint is dated December 11, 1965, for an identical amount. Particulars of this were also set out erroneously in the first letter of November 1, and correctly in the follow-up letter of November 18, 1966.

It should also be noted that the general notification that sodium salts of fatty acids were to be classified under tariff item 105 did not appear until December 23, 1966. It has been argued that until the date of the notice in the *Gazette*, duty was not liveable on the product under item 105. I do not think that this argument is tenable. If duty has been short-paid on any item, then the only relevant section in relation to payment of that duty is s. 118. There has been some suggestion that to allow duty to be charged on items imported prior to December 23, 1966, would in fact be permitting the Commissioner to levy customs retroactively on the substance. The fact is, the notice in the *Gazette* dated December 23, 1966, is not legislation at all. It is merely a notification by the Commissioner of his decision as to the classification of any particular article. This is open to challenge by any importer who thinks that the Commissioner is wrong, and in such case the matter can be litigated in the courts and a decision obtained. In the same way, the Commissioner is free to change his classification on any particular article as further information reaches him, and, as I sought to explain above, it is clear on the authorities that an earlier wrongful classification cannot estop him from taking action to classify correctly and collect the appropriate amount of revenue due.

It has been urged, however, that in respect of the first shipment the Commissioner could only be allowed to collect the sum in fact claimed in the letter of November 1, as this was the only demand made within a year under s. 118. The demand on the 18th setting out the correct sum was made more than a year after the date of entry – November 4, 1965.

Section 118 provides that a person who should have paid duty but has not “shall, on demand by the proper officer, pay the amount short levied”. The proviso states that such demand, i.e. to pay the amount short levied, should not be made after twelve months from the date of such short levy. Mr. Denney argues that the section makes it clear that the amount to be paid is not the amount requested, but the amount short levied. I find the argument difficult to follow where the amount requested is alleged to be the amount short levied. It is only reasonable that a demand for payment should set out the sum allegedly due.

The position can be analysed by considering the situation in which the importer does in fact pay the sum claimed, but later after the expiration of the year, the Commissioner discovers that that sum also involved a short levy because of errors of calculation. It would appear then that the amount short levied would not be the total sum finally demanded after the error has been discovered, but rather the difference between that sum and the sum originally demanded and paid. No demand for that sum would have been

made within twelve months of the date of the short levy, unless that date were taken to be the date of payment in response to the original demand. On a literal interpretation, this result is possible.

The phrase “the date of such short levy” could equally be applicable to short levy at date of importation or short levy when the demand was made under s. 118. The section is intended to be a limitation section, and by interpreting it that way, one could in fact emasculate it, permitting repeated corrections of incorrect levies, provided each correction were made within a year of the immediately preceding one.

Though in this case the amount claimed was not in fact paid within the year, I think the principle should equally be applicable. Once the year has passed, the Commissioner cannot correct any errors he may have made in his demand. Within the year, he is free to make any correction he wishes.

Accordingly, I hold that the Commissioner is entitled to claim only the sum of Shs. 74,330/- in respect of the first consignment.

A further argument was urged by the defendant that quite apart from the question of estoppel, the Commissioner was liable to the defendant company in damages for making a negligent misstatement which resulted in loss to them. The examination of the basis of this claim was indeed fascinating, and there appeared exciting prospects of charting a course through territory hitherto hardly explored. Section 165 of the East African Customs Management Act, however, forced a still birth of this novel claim. That section enables the Commissioner to sue or be sued, but there is a proviso:

“Provided that nothing herein contained shall confer any right of action against the Commissioner in his representative capacity, whether in contract or in tort, unless such right of action is specifically given in any other provision of this Act.”

No other provision of the Act gives a right of action against the Commissioner for damages arising from his negligent misstatements. The defendant company quite properly abandoned this aspect of its claim.

In the result, my answers to the agreed issues remaining are as follows:

1. (a) The substance imported by the defendant company can reasonably be classified as soap.
(b) It can also be classified as sodium salt of fatty acids, in which case, under s. 105 of the East African Customs Management Act, it is the Commissioner’s duty to place it in the classification which will result in it being charged with duty.
2. The plaintiff is not estopped from making his claim either;
(a) by his rulings of May 15, 1965, and July 15, 1965; or
(b) by the *Gazette* notification.
3. The plaintiff is time-barred from demanding the difference between the duty claimed on the first consignment by his letter of November 1, 1966, and that claimed in his letter of November 18, 1966.

Accordingly, there will be judgment for the plaintiff in the sum of Shs. 1,765,817/-, with costs to be taxed.

Judgment for the plaintiff.

For the Commissioner:

RJ Denney (Legal Secretary, E.A.C.S.O.) and *PG Ferro*

For the defendant company:

KC Thakkar and *Tahir Ali*

Editor's Summary

Against this judgment the company appealed, arguing, *inter alia*, that once the Commissioner admitted the substance under item 108 (*k*) this had the effect of delegated legislation and the substance could not then be classified under item 105.

Held – On Appeal (by Sir Charles Newbold, P. and Duffus, J.A.; Law, J. A. dissenting):

- (a) the substance was both soap and also a chemical under tariff item 108 (*k*) which the Commissioner admitted as such to be exempt from customs duty;

(b) (per Duffus, J.A.):

- (i) the Commissioner's exercise of his power to admit the substance duty-free was final and binding both on the Government and on a private individual except if it could be shown that he acted ultra vires; therefore
 - (ii) the substance could not be classified a soap because it had been already admitted duty-free as a chemical under item 108 (k) by the Commissioner acting intra vires;
 - (iii) in considering the word "reasonably" in the context of s. 105 of the East African Customs Management Act 1952 the fact that the purpose of importing the substance was to produce an end product to be manufactured in Tanzania should be given weight.
- (c) (per Newbold, P.) the admission of the substance duty-free and the issue of the general notice by the commissioner were administrative acts not having legislative effect; but by the exercise of his powers in that way the Commissioner had made it unreasonable to classify the substance under tariff item 105 as well as under tariff item 108 (k).

Appeal allowed.

Cases referred to in judgment:

- (1) *Maritime Electric Co. Ltd. v. General Dairies Ltd.*, [1937] 1 All E.R. 748.
- (2) *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.*, [1961] 2 All E.R. 46.

April 10, 1968. The following considered judgments were read:

Judgment

Duffus JA: This is an appeal from the judgment of the High Court ordering the defendant/appellant company to pay the plaintiff/respondent, the Commissioner of Customs and Excise, Shs. 1,765,817/- in respect of import duties short levied on the importation by the appellant company of a considerable quantity of a substance described as "sodium salts of fatty acids", in the form of pellets.

The appellant company are soap manufacturers and it was established at the trial that the sodium salts of fatty acids pellets were imported by the company for the purpose of manufacturing soap and were only used in Tanzania for this purpose. The company had previously imported the necessary caustic alkali and the fatty acids separately in drums but had experienced difficulties over the deterioration of the fatty acids due to its corrosion of the metal drums. The company then found out that it could import the present substance sodium salts of fatty acids which combined both the necessary caustic alkali and fatty acids in pellet form from Russia packed in plastic bags or paper packages. At this stage the company wrote on April 28, 1965 to the Commissioner of Customs and Excise enclosing a sample of the pellets and enquired whether these pellets could be imported under tariff item 108 (k) of the first Schedule of the Customs Tariff Ordinance (Cap. 346) free from import duty. The Commissioner of Customs and Excise duly replied on May 15, 1965 stating that sodium salts of fatty acids pellets may be imported free of duty under tariff item 108 (k). This was followed by a general notice to the same effect issued by the Commissioner of Customs dated June 18, 1965 and published in the *gazette* of July 2, 1965. This

notice was published for general information as an amendment of the interpretation of the Schedule to the Customs Tariff Ordinance as promulgated in the tariff interpretation book. Then the Commissioner by a further letter to the appellant company dated July 15, 1965 again confirmed by his letter that sodium salts of fatty acids pellets were duty free under tariff item 108 (k).

Acting apparently on the strength of this assurance from the Commissioner of Customs and Excise the appellant company placed a large order for these pellets and large quantities duly arrived and were cleared through customs on the basis that tariff item 108 (k) applied free of duty. According to the Schedule attached to the plaint some 3,256,839.72 lbs. of a value of Shs. 1,615,802.68 were so imported between November 4, 1965 and October 7, 1966 free of duty. Towards the end of October, 1966, the customs had second thoughts about these importations and a senior investigation officer of the customs took further samples of the pellets from the appellant company for investigation, and as a result of this investigation the Principal Collector of Customs and Excise at Dar-es-Salaam wrote to the agents of the appellant company on November 1, 1966 stating that the pellets were liable to duty under tariff item 105 and demanding the payment of duty amounting to sum Shs. 543,502.00 based on the value of the pellets. Later on November 18, 1966 the Principal Collector of Customs and Excise again wrote to the appellant company's agents referring to his demand for payment and now calculating the sum on the weight of the pellets and demanding Shs. 1,586,763.00. The action was actually brought to recover Shs. 1,939,499/- but this amount included an importation on October 7, 1966 not included in the two previous demands for payment.

The learned Chief Justice who tried the case accepted the respondent's claim but in view of the fact that s. 118 of the East African Customs Management Act 1952 (12 of 1952), by virtue of which this action was brought, provided that no demand for payment should be made after twelve months from the date of such short levy, the Chief Justice only allowed the plaintiff/respondent the amount first demanded by the letter of November 1, 1966 in respect of the importation made on November 4, 1965. In the final result judgment was given for the plaintiff/respondent in the sum of Shs. 1,765,817/- being import duties payable on goods imported into Tanzania by virtue of the Customs Tariff Ordinance (Chap. 346) as read and construed with the East African Customs Management Act 1952.

Section 3 of the Ordinance provides *inter alia*:

- “3. (1) There shall be charged, levied and collected in respect of the goods specified in the second column of the First Schedule hereto which are imported into Tanganyika import duties at the rates specified in the third column of such Schedule and in addition, subject to the provisions of s. 4 of this Ordinance, suspended duties at the rates specified in the fourth column of such Schedule.
- (2) All import duties and suspended duties shall be levied, collected and paid in accordance with the provisions of the Act.”

The particular tariff items in the first Schedule which are relevant to this case are tariff item 105 and tariff item 108 (k) and these read as follows:

“PART VII – OILS, WAXES, RESINS PAINTS AND VARNISHES

<i>Item</i>	<i>Article</i>	<i>Import Duty</i>
105.	Soap, soap powders, soap ex-tracts and substitutes therefore, n.e.s.	Per 100 lb. Shs. 56/25 (or 37½ per cent. ad valorem, whichever is the greater)”

“PART VIII-DRUGS, CHEMICALS AND FERTILIZERS

108. Chemicals – . . . Free

(k) Other, n.e.s. admitted as such by the Commissioner but not including chemicals, substances or preparations used in the manufacture of beverages, perfumery, cosmetics or toilet preparations.”

According to s. 2 of the Ordinance n.e.s. means “not elsewhere specified”. In a carefully considered judgment the learned Chief Justice first considered whether the pellets of sodium salts of fatty acids could reasonably be classified as soap within the meaning of item 105 of the first Schedule of the Customs Tariff Ordinance. He decided that they could be so classified. In this respect the Chief Justice in his judgment said:

“On a consideration of all the evidence, I would conclude, therefore, that the substance does fall within the item ‘soap’ in the Schedule to the Customs Tariff Ordinance. It consists essentially of sodium salts of fatty acids, and I am satisfied that it can be used as a cleansing agent, although it would not be as efficient as the end product of the defendant company’s manufacture, because of its lower alkalinity . . . It is clearly possible to process less efficient so as to obtain a highly efficient brand product, and this, in my view is what the defendant company does. It is not so much a manufacturing process as a finishing process.”

In concluding this portion of his judgment the Chief Justice said:

“At the very highest, it would appear to me that the substance could be classified both as soap and as sodium salts of fatty acids. If such was the case, then there is a duty on the Commissioner to place it in the classification which would attract the highest rate of duty.”

The Chief Justice relied on the provisions of s. 105 of the East African Customs Management Act 1952, which states:

- “105. (1) Where any goods can reasonably be classified under two or more names, classes, or descriptions, with the result that there is a difference in the liability to duty, or in the duty to which such goods are liable, then such goods shall be classified under the name, class, or description, which results in such goods being liable to duty or being liable to the higher or highest rate of duty applicable, as the case may be.
- (2) In determining for the purposes of sub-s. (1) which is the higher or the highest rate of duty applicable, regard shall be had to any additional or suspended duty or surtax as well as to the basic rate of duty.”

The Chief Justice finally decided as follows:

“In the result, my answers to the agreed issues remaining are as follows;

1. (a) The substance imported by the defendant company can reasonably be classified as soap.
- (b) It can also be classified as sodium salt of fatty acids, in which case, under s. 105 of the East African Customs Management Act, it is the Commissioner’s duty to place it in the classification which will result in its being charged with duty.

2. The plaintiff is not estopped from making his claim either –
 - (a) by his ruling of May 15, 1965, and July 15, 1965; or
 - (b) by the *Gazette* notification.
3. The plaintiff is time-barred from demanding the difference between the duty claimed on the first consignment by his letter of November 1, 1966, and that claimed in his letter of November 18, 1966.

Accordingly, there will be judgment for the plaintiff in the sum of Shs. 1,765,817/-, with costs to be taxed.”

Mr. Mackie-Robertson of the advocates for the appellants submitted, *inter alia*, that the Commissioner had properly admitted the substance in question, the pellets of sodium salts of fatty acids, as “an other chemical” under item 108 (k) and that accordingly these pellets could not be classified under item 105.

It is necessary to decide as to the extent of the powers given to the Commissioner under item 108 (k). Mr. Mackie-Robertson submitted that the power given was “delegated legislation” or a power having a similar effect.

This question appears to have been raised at the trial but not to have been fully argued before the learned Chief Justice. There are, however, references to this issue in the submissions and in his judgment the Chief Justice did say:

“This is open to challenge by any importer who thinks that the Commissioner is wrong, and in such case the matter can be litigated in the courts and a decision obtained. In the same way, the Commissioner is free to change his classification on any particular article as further information reaches him, and, as I sought to explain above, it is clear on the authorities that an earlier wrongful classification cannot estop him from taking action to classify correctly and collect the appropriate amount of revenue due.”

This issue was, however, clearly not covered by any of the grounds of appeal and an objection being taken by Mr. Denney for the respondent Mr. Mackie-Robertson applied for and had his grounds of appeal amended, by adding a further ground as follows:

“That the learned Chief Justice erred in holding:

- (1) that the acts of the Commissioner in admitting sodium salts of fatty acids as an ‘other’ chemical under item 108 (k) was not delegated legislation or the exercise of a power having the effect of delegated legislation;
 - (2) that the Commissioner in so acting was in breach of s. 105 of the Customs Management Act;
- and the Chief Justice erred in failing to find that at all material times sodium salts of fatty acids had been specified or admitted by the Commissioner as an ‘other’ chemical under item 108 (k) and accordingly that the sodium salts of fatty acids imported by appellant was properly entered duty-free.”

The material words in item 108 (k) may be read as “other chemicals, not elsewhere specified, admitted as such by the Commissioner but not including chemicals, substances or preparations used in the manufacture of etc.” Item 108 (k) was amended by the Finance Act 1965 (41 of 1965). Before the amendment this item read, *inter alia*:

“Other chemicals n.e.s. mainly used for industrial or agricultural purposes . . .”

The words “mainly used for industrial and agricultural purposes” were deleted by the amendment and the effect of this was to enlarge the powers of the Commissioner as to the chemicals which he could admit in duty free, so that this would

now clearly include chemicals used in the manufacture of soap. The list of the manufactures to which this concession did not apply was also enlarged and now included cosmetics and toilet preparations. It has not, however, been argued in this case that the type of soap manufactured from the pellets would be a toilet preparation as mentioned here.

It is, however, the respondent's case that the words "not elsewhere specified" did apply, as these pellets should have been included under item 105 as soap. The articles referred to in item 105 are "soap, soap powder, soap extract and substitutes therefore, n.e.s."

There can be no doubt that the Customs Tariff Ordinance gives the Commissioner of Customs and Excise a defined power to act under item 108 (k). In my view, it does not really matter whether this power is held to be that of delegated legislation or of a power having the effect of delegated legislation. The main point is that the Commissioner is empowered to "admit as such" under item 108 (k) "other chemicals not elsewhere specified" provided they do not fall within any of the prohibited purposes of entry, and the Commissioner's exercise of his power is final and binding both on the Government and on a private individual except it can be shown that he has acted *ultra vires*. It does not in my opinion matter whether in exercising this power he does so in regard to a particular assignment or by a general order as in this case.

The power to act under item 108 (k) is reserved only for the Commissioner and it is to be noted that an ordinary customs officer can only admit substances under item 108 (K) on the authority of the Commissioner. The Commissioner in this case had as I have said made what I have termed to be a 'general order' which continued in force until he altered this by a *Gazette* notice published on December 23, 1966.

The real issue in this case is whether the Commissioner in deciding that sodium salts of fatty acid pellets be admitted under item 108 (k) free of duty was acting within the powers given him by law. There can be no doubt that the pellets were sodium salts of fatty acid pellets and were a chemical and the simple question is, as the learned Chief Justice fully appreciated and dealt with in his judgment, whether these pellets could have been reasonably classified under item 105.

On this question I would quote from the Chief Justice's judgment where he said *inter alia*:

"I am particularly attracted by the definition of soap contained in Webster's Dictionary, which reads as follows –

“ ‘A cleansing agent made by action of an alkali and fat and consisting essentially of sodium salt of fatty acid.’

This emphasis on soap as a cleansing agent seems to me eminently correct. It is the sense in which the word is commonly understood by businessmen and ordinary people.”

and then further:

“The fact that soap substitutes are included in the item would indicate that soap in the section was meant to be understood in its ordinary sense, as a cleansing agent, and that the substitutes were meant to be functional substitutes able to perform the tasks which soap performs, that is acting as a cleansing agent. It would appear indeed that any substance, whatever its chemical composition might be, which could be used as a cleansing agent would fall under item 105.”

I agree with the definition given by the Chief Justice but would qualify his definition to this extent; the question as to whether a substance is a cleansing

agent within the ambit of item 105 must be decided by the standards in Tanzania, and the substance must in fact be a “soap, soap powder, soap extracts or substitute” in Tanzania.

In this case it is an established fact that these pellets were imported as sodium salts of fatty acid for the purpose of being used in the manufacture of soap and were so used. This was accepted both by the importer and by the Customs department at the time of importation. As the Chief Justice points out Mr. Khomo, the Government Chemist, gave evidence that the pellets produced a lather and could be used as a cleanser, but the Chief Justice has also found that these pellets were sodium salts of fatty acid. There can, however, be no doubt that these pellets were not imported into Tanzania as a soap or other cleansing agent as defined under item 105 but were imported as the chemical sodium salts of fatty acid for use in the manufacture of soap. I do not think that the fact that the substance could be used for another purpose would change the essential nature and purpose for which it was imported into Tanzania. It appears to me clear that at the time of importation these pellets were regarded by all concerned not as a soap or other cleansing agent but as a chemical to be used in the manufacture of soap.

I am of the view that in a case like this that the use for which the substance was imported and to which it was subsequently put must have an important bearing on the classification of the articles for the purpose of the payment of customs duty. The wording of item 105 and the general intention of the Customs Tariff Law is to place a duty on goods that are being imported into Tanzania and that come within the description in the particular Tariff item. Item 105 must, in my view, refer to a finished product included in the specified items not to substances to be used to produce such a product. The meaning to be placed in the words in item 105 is not that given by any chemical definition or analysis, or by any definition that may be given to the substance in Russia, its interpretation must depend on its ordinary and natural meaning in Tanzania. There is no evidence to suggest that these pellets were used in Tanzania as a soap or other cleansing agent or that it was ever intended that they should be so used. The evidence is that these pellets were imported to be used in the manufacture of soap and the appellant company's chief technical officer gave evidence showing how these pellets were used in the manufacture of the finished product as exhibited in Court. Incidentally excise duty was payable on the manufacture of soap as from June 16, 1966. (Finance Act 1966.)

With great respect I find it difficult to agree with the learned Chief Justice that these pellets of sodium salts of fatty acid could, in the circumstances that I have set out, have been reasonably classified as a soap or other cleansing agent in Tanzania at the time of its importation. The emphasis here is on the word “reasonably”, chemically they could have been classified under either item 105 or 108 (k) but would it be reasonable to classify this substance under item 105 when it was in fact imported into Tanzania for the specific purposes of being used in the manufacture of soap, and was not imported to be itself used as a soap, or cleansing agent, and when this substance was in fact never so used?

This is a question of fact, but in this case the actual facts are not really in dispute, and the issue is really as to the conclusion to be reached on the interpretation of these facts. The question is one of difficulty and of importance but after full consideration and for the reasons that I have given, I am definitely of the view that these pellets could not at the time of their importation into Tanzania have been reasonably classified under item 105.

I am therefore of the view that the admission by the Commissioner of Customs and Excise of these sodium salts of fatty acid pellets under item 108 (k) was within his powers, and that these pellets were correctly admitted free of duty.

I would therefore allow this appeal and set aside the judgment and decree of the High Court and order that the action be dismissed with costs to the appellant and would allow the appellant the costs of this appeal with a certificate for two counsel.

Sir Charles Newbold P: The facts of this appeal are set out in the judgment of Duffus, J.A., which, together with the judgment of Law, J.A., I have had the advantage of reading in draft. I find it unnecessary to restate the facts, submissions and legislation save in so far as this is necessary to give point to the reasoning for my judgment.

The basic question for decision is whether the Commissioner is entitled to recover from the importer Shs. 1,765,817/- being customs duty to which the pellets were allegedly liable on importation and which has not been paid. The Chief Justice held that the Commissioner was so entitled; and from that decision the importer has appealed. The basic question depends on the answer to a number of subsidiary questions, each of which I shall consider in turn.

The first is whether the pellets are soap. The Chief Justice held that they were. I have no doubt that he is correct. The word “soap”, referring as it does to an article in everyday ordinary domestic use, must be interpreted in its ordinary meaning and not in any special meaning, such as a chemical meaning or a commercial meaning. It is urged that the pellets are soap within a chemical meaning of that word but that they are not soap within its commercial meaning. The Chief Justice referred to the definition of soap given in a well-known dictionary. That definition reads – “a cleansing agent made by action of an alkali and fat and consisting essentially of sodium salts of fatty acid.” It is accepted by the importer that the pellets come within that definition. During the argument I asked Mr. Mackie-Robertson if he could refer to any definition of soap given in any dictionary which would not cover these pellets; and he was unable to do so. The evidence is that the pellets, if used as soap, would perform the basic functions of what the ordinary human being expects soap to do, though they may not smell as nice, nor look as nice, nor perform those functions as effectively, as some other soaps. A mini-skirt is nonetheless a skirt, even if it does not look as nice nor perform the functions of a skirt as effectively as a maxi-skirt. I do not accept that because the pellets were imported to undergo a further stage of industrial process before being marketed as soap therefore they are not soap. Brown sugar is nonetheless sugar though by a further process it may be put on the market as the more refined white or cube sugar. I am satisfied therefore that these pellets were soap. They could, therefore, come within tariff item 105, which reads, insofar as it is relevant – “soap, soap powders, soap extracts and substitutes therefore n.e.s.” The letters n.e.s. mean “not elsewhere specified”. I leave for consideration later the effect of these words on this item.

The next question is whether the pellets are “other chemicals”. The evidence, which is undisputed, is that they are a chemical compound of sodium salt of fatty acids. This chemical compound is not elsewhere mentioned in tariff item 108 though other chemical compounds are referred to. Thus the pellets are clearly other chemicals. Tariff item 108 (k), so far as is relevant, reads – “Chemicals – other, n.e.s. admitted as such by the Commissioner . . .” I shall consider later the effect of the letters n.e.s. in the tariff item. I am satisfied, therefore, that subject to any different result as a consequence of the presence of the letters n.e.s., these pellets were other chemicals and could have been admitted as such by the Commissioner under tariff item 108 (k).

Does the presence of the letters n.e.s. in tariff items 105 and 108 (k) make any difference to my conclusion that the pellets were both soap and other chemicals? I do not think that they do. These letters either mean that the

article in question, in this case pellets, is not elsewhere specified under any description or is not elsewhere specified under a description which would fall within the particular tariff item in which the letters occur. For example, taking tariff item 105, the letters n.e.s. could mean either that the pellets are not elsewhere specified under any description (in this case they are, as they are specified under other chemicals) or are not elsewhere specified under any description which would come within the meaning of the words “soap, soap powders, soap extracts and substitutes therefore”. I do not think that these letters are intended to refer to a description of the article which would not bring it within the words of the tariff item in which the letters occur. In other words, the fact that these pellets, which are soap, are also other chemicals does not mean, as far as tariff item 105 is concerned, that they are elsewhere specified and thus no longer come within the tariff item 105. Conversely, the fact that the pellets, which are other chemicals, are also soap does not mean that they are excluded from tariff item 108 (k). Were it otherwise the letters would be mutually destructive and the pellets would come under neither item. In my view the words “not elsewhere specified” mean not elsewhere specified under a description which comes directly within the description in the tariff item in which the letters occur. This is not the position in this case and thus these letters can be disregarded as they do not have the effect of excluding the pellets either from the tariff item 105 or from tariff item 108 (k).

I have thus arrived at the conclusion that the pellets are soap and could come under tariff item 105 and are also other chemicals and could come under tariff item 108 (k). Tariff item 108 (k) contains, however, an additional qualification; other chemicals may only be admitted under this item if they are admitted as such by the Commissioner. In fact these pellets were admitted by the Commissioner as other chemicals under tariff item 108 (k). Mr. Mackie-Robertson submits that the act of the Commissioner in admitting the pellets as other chemicals under tariff item 108 (k) was an act having legislative effect, with the result that the pellets came under that tariff item only and can no longer come under tariff item 105. On the other hand, Mr. Denney, for the Commissioner, submits that as the pellets can come under each of the two tariff items, therefore under s. 105 (1) of the East African Customs Management Act 1952, the pellets must be classified under tariff item 105, which would result in duty being leviable, and not under tariff item 108 (k), which would result in the pellets being admitted duty free.

Was the act of the Commissioner in issuing a general notice and in admitting these pellets under tariff item 108 (k) an act having legislative effect? In my view clearly it was not. The act of admission was the exercise of an administrative power given by the legislation to the Commissioner, but the exercise of the power did not have legislative effect. It was urged that the act of admission was dependent upon the issue of the general notice amending the Tariff Interpretation Book and bringing within tariff item 108 (k) sodium salt fatty acid pellets and that the general notice had legislative effect, with the result that the pellets came only within tariff item 108 (k) and were excluded from tariff item 105. I do not accept this. In the first place, I have no doubt that the Commissioner could have admitted the pellets under the power given to him in tariff item 108 (k) whether or not the general notice had been issued – his power of admission stemmed from the tariff item and not from his own interpretation of the tariff item as set out in the general notice. Secondly, the general notice amending the tariff interpretation book was an administrative direction given by the Commissioner to Customs officers informing them that they could, in his name and with his authority, exercise the power given to him and admit the pellets, which were in fact other chemicals, under tariff item 108 (k). It

did not purport to have legislative effect; indeed, under s. 2 of the Interpretation and General Clauses Ordinance (Cap. 1) a general notice is defined as an announcement “not of a legislative character”. This administrative direction could have been given in a number of ways and, as I have said, the power given in the tariff item could have been exercised by the Commissioner or by any officer generally or specially authorised thereto without any such notice having been issued. Finally, the tariff interpretation book specifically, and in my view rightly, disclaims any legislative effect and purports only to be an explanatory guide to the legislation.

The next and final question is whether, as the pellets could come under tariff item 105 and could also come under tariff item 108 (k), therefore by reason of s. 105 (1) of the East African Customs Management Act 1952, they must be classified under tariff item 105 and be liable to duty. The relevant part of s. 105 (1) reads:

“Where any goods can reasonably be classified under two or more names, classes or descriptions . . .”

It is to be noted that the important word is “reasonably”, as the subsection could just as easily have read “where any goods can be classified . . .” It is also to be noted that the subsection requires that it be reasonable to classify the goods under “two or more names, classes or descriptions” and not that it be reasonable to classify the goods under each of a number of different names, classes or descriptions. What does the word “reasonably” mean in the subsection? In my view it means that when all the circumstances of the particular case are considered are those particular circumstances such that it would be right and proper to say that the goods could be classified under “two or more names, classes or descriptions”? The particular circumstances of this case are that the goods could be classified as either soap, coming within tariff item 105, or as other chemicals, coming within tariff item 108 (k). In the case of tariff item 108 (k) however, there appear the words “admitted as such by the Commissioner”. The inclusion of those words adds to the tariff item a particular qualification which need not have been added if the intention was merely to classify other chemicals. A similar qualification does not exist in the case of tariff item 105. The Commissioner, in exercise of this specific power given to him by the legislation, admitted the pellets under tariff item 108 (k) and it is only as a result of the exercise of this discretionary power that the pellets were admitted under that tariff item. In these particular circumstances I cannot see how it would be reasonable to classify the pellets both under the tariff item 105 and tariff item 108 (k) when the Commissioner, by exercising the power given to him by the legislation, has chosen to impress upon the pellets the additional and peculiar qualification necessary for admission under tariff item 108 (k). By specifically and in exercise of this power admitting the pellets under tariff item 108 (k) he has made it unreasonable to classify the pellets under tariff item 105 as well as under tariff item 108 (k). The result is that the pellets were not liable to duty and the Commissioner is not entitled to claim the amount set out in the plaint.

For these reasons I would allow the appeal, set aside the judgment and decree of the High Court and substitute therefore a judgment and decree dismissing the suit with costs. I would allow the appellant the costs of the appeal with a certificate for two advocates. As Duffus, J.A., has arrived at the same conclusion, though by a somewhat different route, it is ordered accordingly.

Law JA: For many years the appellant company imported caustic alkali and fatty acids separately, duty free, as chemicals for use in the manufacture of soap. This was not satisfactory, because the metal drums in which the acids were imported became corroded and leaked, and the acids suffered

discoloration making it difficult to obtain a uniform standard of soap production. Early in 1965 a Russian industrial fair was held in Dar-es-Salaam, and a technical officer at that fair, whom the appellant's representative Mr. Bharmal consulted, suggested that the appellant should consider using a compound of caustic alkali and fatty acids, which could be imported in cartons or bags. Mr. Bharmal signed a preliminary contract for ten tons of this substance, on condition that a sample of 100 kilos was first supplied. In the contract the substance was described as "washing soap in noodle form", and in the certificate of quality accompanying the first 100 kilos it was likewise described as "washing soap (in noodles form)". The sample proved satisfactory, and on July 9, 1965, the appellant confirmed its order for the balance of the consignment, making it however a term of the final contract that "the invoices and all other documents should refer to the goods as 'sodium salt of fatty acid pellets' and no other definition should be used". Accordingly, in the contract subsequently drawn up by the exporters, and signed by them and the appellant, the words "washing soap (in noodles form)" against the words "denomination of goods" were crossed out, and the words "sodium salt fatty acid pellets" substituted. The reason for this is obvious, as soap is dutiable under item 105 of the Customs Tariff. On April 28, 1965, the appellant wrote to the Commissioner of Customs and Excise, apprising him of its intention to import "sodium salt of fatty acids" in pellet form, instead of caustic soda and fatty acids in drums as in the past, and enclosing a sample of the substance. By his letter of May 15, 1965, the Commissioner replied as follows:

"With reference to your letter dated April 28, 1966, you are advised that Sodium Salt Fatty Acid pellets may be imported free of duty under Tariff Item 108 (k)".

and on July 2, 1965, a general notice in the *Tanzania Gazette* listed a number of "rulings" as to the interpretation of the tariff, including "Sodium Salt Fatty Acid Pellets . . . 108 (k)". Towards the end of 1966 a customs officer in Dar-es-Salaam visited the appellant's factory and formed the opinion that the substance was in fact soap and not merely a compound of chemicals used in the manufacture of soap. On November 1, 1966, the Principal Collector of Customs wrote to the appellant, informing it that the pellets were subject to duty as soap under tariff item 105, and claiming duty of over Shs. 500,000/- in respect of pellets imported in 1965 and 1966. By a general notice in the *Tanzania Gazette*, dated December 23, 1966, a new ruling was published, placing sodium of fatty acids (soap) under tariff item no. 105. This appeal now involves over Shs. 1,750,000/- claimed by way of customs duties.

The first question for decision in this appeal is whether the learned Chief Justice was correct in holding that the substance was soap. I have no doubt that he was right. The definitions of soap to be found in dictionaries and the *Encyclopaedia Britannica* are to this effect: soap is a chemical compound or mixture of chemical compounds resulting from the interaction of fatty oils and fats with alkali, that is to say the salts of fatty acids. That is precisely the nature of the substance, the subject of this appeal. The substance was described as soap in the exporters' original documents, and this description was changed, when it came to drawing up the contract, to "sodium salt fatty acid pellets", but only because the appellant insisted that it should be so described. In the certificate of quality the substance was described as "washing soap . . . in conformity with the samples and standards existing in the USSR". The experts on both sides agreed that chemically the substance was soap, but Dr. Grant, the appellant's expert, would not agree that it was soap in the commercial sense. I consider that, on the evidence, the Chief Justice was justified in holding, as

he did, that the substance fell within the item “soap” in item 105 of the Customs Tariff, under which item it would be liable to duty.

The question then arises as to the effect of the Commissioner of Customs’ letter informing the appellant that the substance could be imported duty free, under item 108 (k) of the tariff, as “sodium salt of fatty acid pellets”, and of the subsequent *Gazette* notice conveying his “ruling” to the same effect. The learned Chief Justice said that, in these circumstances, the doctrine of estoppel would normally apply, but that it could not be raised as a defence in this case because the effect would be to prevent the Commissioner from carrying out a duty imposed on him by statute, and he relied in this respect on the authority of the cases of *Maritime Co. Ltd. v. General Dairies Ltd.*, [1937] 1 All E.R. 748 and *Southend-on-Sea Corporation v. Hodgson (Wickford) Ltd.*, [1961] 2 All E.R. 46. Although it was a ground of appeal that the Chief Justice erred in law in deciding that the plaintiff was not estopped from demanding duty, Mr. Mackie-Robertson for the appellant did not press this ground, and I understood him to concede that the learned Chief Justice’s conclusions on the issue of estoppel were right, as in my view they undoubtedly were. Instead of relying on estoppel, Mr. Mackie-Robertson applied to amend the memorandum of appeal by adding the following new ground:

“That the learned Chief Justice erred in holding –

(1) that the acts of the Commissioner in admitting sodium salt of fatty acid as ‘another’ chemical under item 108 (k) was not delegated legislation or the exercise of a power having the effect of delegated legislation;

(2) that the Commissioner in so acting was in breach of s. 105 of the Customs (Management) Act;

and the Chief Justice erred in failing to find that at all material times sodium salt of fatty acid had been specified or admitted by the Commissioner as ‘another’ chemical under item 108 (k) and accordingly that the sodium salt of fatty acid imported by the appellant was properly entered duty free.”

Mr. Denney for the respondent objected to the inclusion of this new ground of appeal, on the grounds that the question whether the Commissioner’s “ruling” embodied in a general notice published in the “Tanzania *Gazette*” amounted to legislation was not directly raised in the court below. We gave leave for the fresh ground to be added to the memorandum of appeal, and argued before us, because in our view it involved a point of general public importance, and because it had been adverted to in the judgment, the Chief Justice remarking that the *Gazette* notice “is not legislation at all”.

The definition of “subsidiary legislation” in s. 2 of the Interpretation Act (Cap. 1, Laws of the High Commission) reads as follows:

“ ‘subsidiary legislation’ means any Proclamation, rule, regulation, order, notice, by-law, decree, or other instrument made under any Act or other lawful authority and having legislative effect.”

The question therefore is whether the Commissioner’s “ruling” contained in the General Notice in the Tanzania *Gazette* of July 2, 1965, to the effect that “sodium salt of fatty acid pellets” came under item 108 (k) of the tariff, and were accordingly free of import duty, had legislative effect. The power of the Commissioner to admit, duty free, chemicals which are “not elsewhere specified” in the tariff is to be found in para. (k) of item 108, which (as amended by s. 5 (m) of the Finance Act 1965, of Tanzania) reads as follows:

“(k) Other, n.e.s. admitted as such by the Commissioner but not including chemicals, substances or preparations, used in the manufacture of beverages, perfumery, cosmetics or toilet preparations . . . free.”

Sodium or salt of fatty acids were not at the material time specified elsewhere in the tariff in those words, and it was open to the Commissioner to admit them, as chemicals, for use in the manufacture of commercial washing soap, not being a cosmetic or toilet preparation, under item 108 (k) of the tariff, provided they did not in fact fall within another item in the tariff. Having decided to admit the substance, the subject of this appeal, the Commissioner conveyed his decision to the public in the form of a general notice in the *Gazette*. The learned Chief Justice held that this notice had no legislative effect, but I am inclined to the view that it had. So long as an “admission” by the Commissioner under item 108 (k) is properly made within his powers, that is to say in relation to a chemical not elsewhere specified in the tariff, and not used in the manufacture of beverages, perfumery, cosmetics or toilet preparations, then publication of such “admission” by notice in the *Gazette* has the same effect as if the tariff had been amended by the legislature: a new chemical substance is added to the tariff. Whether the Commissioner’s decision to admit the substance, the subject of this appeal, as a duty free chemical, had legislative effect or was merely an administrative act done under statutory powers, does not seem to me to matter; the effect in both cases was the same, and the identical substance became classifiable both under item 105, as soap, and under item 108 (k), as “another” chemical. By s. 105 (1) of the East African Customs Management Act:

“Where any goods can reasonably be classified under two or more names, classes or descriptions, with the result that there is a difference in the liability to duty, or in the duty to which such goods are liable, then such goods shall be classified under the name, class or description which results in the goods being liable to duty or being liable to the higher or highest rate of duty applicable, as the case may be.”

Could the substance, imported in pellet form, “reasonably be classified” under both item 105 and item 108 (k)? If so, it was liable to duty under item 105. As soap, it was in a crude form, unsuitable for marketing as such. The Commissioner knew that it was not being imported for direct re-sale as soap, but for use in the manufacture of soap. The substance was both a compound of chemicals, and soap. Item 105 relates to “soap, soap powders, soap extracts and substitutes therefore, n.e.s.” It has been argued for the appellant that item 105 only applies to soap in the commercial sense, that is to say to soap imported in a finished state, recognizable as a washing agent, and imported in a condition suitable for immediate use and resale. On the other hand, item 105 is so worded as to cover a very wide field, including even substitutes for soap, soap powders and soap extracts. I do not see how the substance, the subject of this appeal, which is in fact a form of soap and which, according to the evidence, conforms with the standards laid down for soap in Russia and in Tanzania, can be said not reasonably to fall within item 105. It follows then, in my opinion, that notwithstanding the Commissioner’s admission of the substance as “another chemical admitted as such” under item 108 (k), the substance was at the same time reasonably classifiable under item 105 as soap, and that in accordance with s. 105 of the Act, duty must be levied on it at the rate applicable to soap. I would accordingly dismiss this appeal.

Appeal allowed. Judgment and decree of High Court set aside. Case dismissed with costs to the appellant.

For the appellant company:

JA Mackie-Robertson, QC, KC Thakkar and Tahir Ali

For the respondent Commissioner:

RJ Denney (Counsel to the East African Community)

For the defendant/appellant company:

Tahir Ali & Co, Dar-es-Salaam

For the plaintiff/respondent Commissioner:

Legal Secretary, East African Community

City Council of Kampala v Mukubira and another
[1968] 1 EA 497 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	18 April 1968
Case Number:	435/1966 (70/68)
Before:	Goudie J
Sourced by:	LawAfrica

[1] Landlord and tenant – Covenant not to assign, sublet or part with possession – Assignment of tenancy – Breach of condition in lease – Assignor retaining key to premises.

[2] Landlord and tenant – Waiver – Whether demand for rent after suit for possession filed acts as an estoppel.

[3] Estoppel – Landlord and tenant – Whether demand for rent after suit for possession filed acts as an estoppel.

Editor's Summary

The City Council of Kampala sued the first and second defendants for possession of shop premises in Kampala, and for rent, mesne profits and costs. The first defendant occupied the premises under a tenancy agreement with the Council, containing a cl. 2 (14) which provided: "The tenant agrees not to assign, underlet or part with the possession of the premises or any part thereof". Since the commencement of the tenancy, the second defendant had been carrying on some form of business in the premises. The Council contended that the first defendant had parted with possession of the premises in breach of the tenancy agreement; but the first defendant claimed that he had always held one key to the premises, that he visited the premises from time to time and that the second defendant was running the business in the premises in partnership with him, the first defendant. The first defendant offered to give possession of the premises to the Council on condition that the Council undertook not to let to the second defendant within three years, which offer was not accepted by the City Council. The Council wrote on February 22, 1967, demanding rent for January and February, 1967, after the exercise of their option of forfeiture of the tenancy and counsel for the first defendant argued that this demand operated as a waiver in law.

Held –

- (i) as the suit was filed on May 27, 1966 no subsequent action could operate as a waiver (*Evans v.*

Enever (1) adopted);

- (ii) neither did the letter demanding rent create an estoppel;
- (iii) the first defendant had failed to show any partnership agreement between himself and the second defendant and there was therefore a breach of the tenancy agreement by the first defendant in parting with possession of the premises.

Judgment for the plaintiff with costs.

Cases referred to in judgment:

- (1) *Evans v. Enever*, [1920] 2 K.B. 315.
- (2) *Haji Kaluna Nyanzi v. Dandi Mukubira*, Civil Appeal No. B.305 of 1965 (unreported).
- (3) *City Council of Kampala v. Mukibi*, [1967] E.A. 368.
- (4) *Karshe v. Uganda Transport Co. Ltd.*, [1967] E.A. 774.

Judgment

Goudie J: The plaintiff, the City Council of Kampala, is suing for possession of shop premises at 24, South Street, Kampala, and for rent, mesne profits, and costs.

Possession is sought against both defendants on the ground that the tenant, the first defendant, put the second defendant into possession of the suit premises in breach of a term of his tenancy agreement forbidding him to assign, underlet, or part with the possession of the premises. The prayer asks for judgment against “the defendant” but inasmuch as there are two defendants shown in the plaint and para. 5 avers that the plaintiff is entitled to possession against “both defendants” there can be no doubt that the word “defendant” should read “defendants” in the prayer and I propose to treat this as a clerical error only and to amend the plaint accordingly.

It is undisputed that the first defendant occupied the suit premises under a tenancy agreement dated October 31, 1962 as varied by a supplemental agreement dated December 8, 1964 confirming the main agreement except in regard to an increase of rent. Clause 2 (14) of the agreements by the tenant reads:

“not to assign, underlet or part with the possession of the premises or any part thereof.”

It is undisputed that at least since the commencement of the tenancy the second defendant has been carrying on some form of business in the suit premises and that he has been in physical occupation thereof by reason of some relationship between himself and the first defendant. It is the Council’s case that at the least the first defendant parted with possession to the second defendant in breach of his agreement. The first defendant, on the other hand, says he has always held one key to the premises, he has visited these from time to time, and the second defendant is running a business in the suit premises in conjunction with the first defendant as his partner.

To establish the partnership relationship the first defendant relies on an alleged partnership agreement between himself and the second defendant dated January 3, 1965 which he admits was in similar terms to an earlier partnership agreement entered into on March 10, 1959 which he says was due to expire in April, 1963 but which seems to have been supposed to have carried over until the subsequent agreement of January 3, 1965. The earlier agreement was not proved and the first defendant in his pleadings and in evidence clearly relied upon the agreement of January 3, 1965, a copy of which was marked annexure A to the first defendant’s written statement of defence.

Before going on to the merits of the suit I propose to deal with some points of law raised by Mr. Shah for the first defendant.

Mr. Shah said his client was willing to give possession forthwith if the plaintiff Council were willing to undertake not to let to the second defendant within three years. As the offer was not taken up he asked me to draw a conclusion that there was some secret agreement or lack of bona fides in the relationship of the Council and the second defendant who gave evidence favourable to the Council’s case. If the Council is entitled to possession at all they are entitled to unconditional possession except in so far as the Court may see fit to impose equitable conditions. I therefore draw no inference one way or the other for non-acceptance of the first defendant’s offer. Next, Mr. Shah argued that the Council’s letter of February 22, 1967 demanding rent for January and February, 1967 after the Council had exercised their option of forfeiture of the tenancy operates as a waiver in law. However, the suit was filed on May 27, 1966. The filing of a suit is an “irrevocable election to determine the lease” and no subsequent action can operate as

a waiver of this option whilst the suit is pending (*Evans v. Enever*, [1920] 2 K.B. 315, per Lord Coleridge).

It was further suggested that the Council's letter of August 18, 1965 operated as an estoppel and the Council were not now at liberty to deny the relationship between the two defendants.

It does not seem to me that any question of estoppel arises out of this letter. Apart from the fact that the first defendant is not shown to have acted upon any representation made by the Council in this letter, as required by s. 113 of the Evidence Act, it seems quite clear to me that all the Council was saying was that business arrangements alleged to exist between the two defendants were entirely personal to them and did not justify Council interference in assisting the first defendant to evict the second defendant. I cannot see how this prevents them exercising a right of forfeiture so as to evict both defendants if in fact there has been a breach of covenant.

Next, it was suggested that the judgment of Sheridan, J. in Civil Appeal No. B.305 of 1965, *Haji Kaluna Nyanzi* [the second defendant in this suit] v. *Dandi Mukubira* [the first defendant in this suit] to the effect that the Agreement of January 3, 1965 was not a sub-lease but "a business venture, a partnership" made this issue in this suit as to whether or not this Agreement was a partnership or not, a matter which was "res judicata".

I do not consider that this agreement carries any weight. The learned judge was not ruling on the validity of the document and he had heard no evidence as to the circumstances in which it was executed. All he was saying was that on the face of it the document did not deal with an interest in land or have any connection with the Council's lease. Entirely on an issue of jurisdiction, therefore, he held that a lower court had jurisdiction to entertain a suit brought by the present first defendant against the present second defendant on the document.

As requested by Mr. Shah I have carefully read the lengthy judgment of the learned Chief Justice in *Karshe v. Uganda Transport Co. Ltd.*, [1967] E.A. 774. in which he examined in detail the English and Uganda law on the subject of "res judicata". Nothing in that judgment leads me to suspect that any question of res judicata can possibly assist in the present case. Apart from all else the City Council was not a party to Civil Appeal B.305 of 1965 or the suit from which it arose – Principal Court Civil Case No. 208 of 1965. Section 7 of the Civil Procedure Act provides that:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit *between the same parties or between parties under whom they or any of them claim, litigating under the same title . . .*"

The second defendant said unequivocally that the suit premises were sub-let to him by the first defendant in 1959 at a rental of Shs. 150/- per month in addition to his paying the first defendant the head rent and the charge for the annual trading licence which the first defendant paid to the City Council. The alleged partnership agreement was, he said, only a bluff to deceive the City Council so that the Council would not know that the first defendant had sub-let.

I treat the evidence of the second defendant with considerable reserve as he admitted to being a party to a deliberately dishonest document made with intent to deceive. At the same time his evidence was simple and straightforward and entirely unshaken in cross examination. It was also against his interest unless he had some secret arrangement about a tenancy with the Council which he denied and of which there was no evidence.

The alleged partnership agreement of January 3, 1965, on the face of it is a most suspicious document and when one considers it against the background and circumstances even as admitted by the first defendant, I do not consider any

reasonable person could possibly accept that it is simply what it purports to be. In order to accept it and the previous 1959 agreement I would have to accept the following established facts and admissions to be reasonably possible. In 1959 the two defendants entered into a partnership agreement in similar terms to the 1965 agreement. In 1959 the first defendant put in capital of Shs. 50/-. He received no share of profits and neither he nor the second defendant put in any more capital until 1965. In 1965, having received not a cent from the partnership, the first defendant entered into a fresh partnership and put in a further Shs. 50/- to keep the partnership running for a further six months. The idea to me is ludicrous and I was not surprised that there was not a title of evidence in the way of books or papers to support the alleged partnership and that the first defendant could not give any vestige of a description of the nature of the business or its stock in trade, apart from thinking there might have been a sack of sugar and a bit of soap. He could not give any reasonable account of how often even he called at the premises. If one examines the so-called partnership agreement it will be seen that its only suggestion of authenticity was its signature before advocates as witnesses. The second defendant said the document was also drafted by the advocates. Whether that is so or not even its authenticity is not improved by the fact that the copy annexed to the defence (admitted by consent) shows the parties to have signed:

“In the presence of M/s Mbazira and Sengooba, advocates, P.O. Box 2980, Kampala.”

I do not know how a document can be executed in front of a firm and it could be significant that no individual member of the firm saw fit to witness it. The words in the agreement “David Musoke Mukubira is responsible to the premises at No. 24, South Street, Kampala; he is hiring it from Kampala City Council” seems an obvious attempt to excuse something in advance of any accusation. They also seem rather unnecessary when one considers what is left out of the agreement. There is no mention of anything put into the partnership by the second defendant, no arrangement about distribution or shares of profits during or at the end of the partnership, nothing about the distribution of partnership assets. Mr. Shah suggested that all trading was to be on credit so Shs. 100/- total capital was not unreasonable (Shs. 50/- in 1959, and Shs. 50/- in 1965). Even if this were so, which I am unable to accept, why should the first defendant continue a partnership which had brought him no profit for seven years?

Looking at the correspondence one sees that on August 13, 1965, the first defendant refers to the break-up of his business relations with the second defendant “with whom I have been dealing and handling business”. The first defendant’s then advocate wrote on December 8, 1965 that the second defendant “was a business associate of our client”. I have searched in vain for any evidence that the first defendant had any dealings or business association with the second defendant, and if they were full partners why not have said so. Mr. Shah argued that the second defendant was at most a licensee and pointed to the evidence that the first defendant held one key to the premises throughout. He referred me to Civil Suit No. 456 of 1966 – *City Council of Kampala v. Mukibi*, [1967] E.A. 368. It is true that in that suit the learned Chief Justice held that although the occupying partners were paying ‘rent’ to the tenant, he had not infringed the covenant “not to assign, underlet or part with the possession of the premises or any part thereof”. He also referred to possession of the key by the tenant as “a point of great importance”. I am not, of course, bound by the decision but naturally it is given persuasive weight. The facts in that case were, however, utterly different from those in the instant case. In the barber’s case the evidence was that the tenant locked and unlocked the door each day, that not being a barber himself he nevertheless furnished the premises for use as a barber’s shop,

and that he kept a great deal of personal control over the premises. In the present case I am satisfied that the first defendant on his own admissions only paid very infrequent visits, and took no personal part in the business even supervisory or for checking purposes.

I find unhesitatingly that the first defendant has failed to show in this case any partnership arrangement between himself and the second defendant and that the agreements suggesting a partnership were deliberately designed to deceive the landlords. I find that there was a breach of the agreement in that the first defendant parted with possession of the premises to the second defendant. I further find the rent and mesne profits due as claimed.

There will be judgment for the plaintiff as prayed with costs.

Order accordingly.

For the plaintiff:

MK Joshi

MK Joshi, Kampala

For the first defendant:

JS Shah

Hunter & Greig, Kampala

The second defendant in person.

**Figueredo v Editor Sunday Nation and others;
Sanghani v Same; Trivedi v Same**
[1968] 1 EA 501 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	10 May 1968
Case Number:	581 and 621/1966 and 91/1967 (85/68)
Before:	Dickson J
Sourced by:	LawAfrica

[1] *Defamation – Libel – Accusation of crime – Conviction irrelevant.*

[2] *Defamation – Libel – Fair comment – Proof of facts on which comment founded – Onus on defendant.*

Editor's Summary

The plaintiffs in all three cases were Ugandan Asians who claimed to have been defamed as a result of publications in the defendant's newspaper. The article contained *inter alia* the following passages:

“There are about 25 Asians now getting ‘free board and lodging’ in Uganda’s biggest prison – Luzira . . . Asian leaders should publicly condemn these acts of crime . . . And these rogues who have been jailed should be deported by the Uganda Government . . . Every country from time to time deports undesirable aliens. If the men serving sentences at Luzira were Uganda citizens, then of course they could not be deported . . . My information is that the majority of them are not . . . I understand that the men recently convicted of forgery and conspiracy are all (except perhaps an odd exception) non-citizens. Forgery on the scale perpetrated by these men has hitherto been unknown in Uganda . . . This time they forged Congo currency, next time it may be East African notes . . . Britain and America have not hesitated in deporting undesirable aliens, including the notorious Messina brothers and the Mafia killers.”

It was common cause that the plaintiffs were, on May 19, 1965, convicted by the district court of Mengo of conspiring together to forge Rwanda Burundi 1,000 franc currency notes and the second plaintiff was additionally convicted of possessing a plate for the forging of currency notes of that description. They

appealed and their appeal was allowed by the High Court on July 28, 1965. The articles in issue were published on May 23, 1965. The defence conceded that the statements were defamatory of the plaintiffs and the only issue to be resolved was the defence of “fair comment”.

Held –

- (i) to succeed in a defence of fair comment the defendant must show *inter alia* that each and every statement of fact in the words complained of is true;
- (ii) to say that the plaintiffs had been convicted of or had committed forgery was not a fact truly stated;
- (iii) the use of the word “rogue” amounted to more than mere abuse and there was no evidence to support the statement as being true;
- (iv) “acts of crime” inferred that crimes had in fact been committed and there was no evidence that the plaintiffs had committed any crime;
- (v) there was no proof that any of the plaintiffs were “undesirable”.
- (vi) to say that the plaintiffs “this time forged Congo currency” was not a true statement of fact;
- (vii) in the result, the plea of fair comment failed.

Judgment for the plaintiffs.

Cases referred to in judgment:

- (1) *Digby v. Financial News Ltd.*, [1907] 1 K.B. 502.
- (2) *Peter Walker v. Hodgson*, [1909] 1 K.B. 239.
- (3) *Kemsley v. Foot*, [1952] 1 All E.R. 501.
- (4) *Joynt v. Cycle Trading Publishing Co.*, [1904] 2 K.B. 292.
- (5) *Hollington v. Hewthorn*, [1943] 1 K.B. 587.
- (6) *Hinds v. Sparks*, [1964] Crim. L.R. 717.
- (7) *Turner v. M.G.M.*, [1950] 1 All E.R. 449.

Judgment

Dickson J: The above three suits were by Order of Court consolidated.

The plaint in all three suits is identical and the issues in all cases are identical, except perhaps as to the quantum of damages.

The plaintiffs claim against the three defendants, and each of them, damages:

- “1. For a Libel published on May 23, 1965 in the issue of the ‘Sunday Nation’ edited by the first defendant published and printed by the second defendant and written by the third defendant.
- 2. For a Libel published in the issue of the ‘Sunday Nation’ of June 6, 1965 edited by the first defendant published and printed by the second defendant and written by the third defendant.

3. For a Libel published in the issue of 'Sunday Nation' of June 13, 1965 edited by the first defendant and published and printed by the second defendant and written by the third defendant.
4. Interest on the amount of damages from date hereof till payment in full.
5. Costs of this suit.
6. Any other relief."

At the commencement of the hearing, the parties agreed to the following framed issues, which were approved by the court. The issues are:

- (1) Did the publications, and if so which of them, refer to the plaintiffs?

- (2) If so, are the words in so far as they consist of allegations of fact true, and in so far as they consist of expressions of opinion fair comment?
- (3) If not, what damages is each of the plaintiffs entitled to?
- (4) Costs.

It was further agreed between the parties and approved by the Court, that the hearing for the moment be confined to the first two issues.

The publication of May 23, 1965 reads as follows and is exh. P.3.:

“About 25 Asians are now getting ‘free board and lodging’ in Uganda’s biggest prison – Luzira. Half of them went in this year on charges ranging from smuggling, forgery, and corruption to gun running.

The majority of law abiding Asians here feel that they have been let down by these rogues. Only the other day an African colleague remarked: ‘Luzira is full of Asians’.

Crime is not, of course, confined to any particular community but the Asian has to be doubly careful because he is a non-indigenous member of the community.

Speaking as an Asian, I would suggest that Asian leaders should condemn publicly these acts of crime and appeal to the general Asian public to cooperate fully with the police with information about any illegal activities by individuals among the community.

And the rogues who have been jailed should be deported by the Uganda Government to India or Pakistan (as the case may be) after they have served their terms. Only then can perhaps the slate be wiped clean.”

The second publication, which is exh. P.4., was published on June 6, 1965 reads as follows:

“Every country from time to time deports undesirable aliens. If the men serving sentences at Luzira were Uganda citizens, then of course they could not be deported. We don’t know what tothering means but we doubt whether Billy Chibber, one of the foremost Asian journalists in East Africa, is either tothering or conservative.”

The third publication, which is exh. P.5., was published on June 13, 1965 and reads as follows:

“My plea for the deportation of several Asians convicted of serious criminal offences has invoked wrath in certain Asian quarters.

Mr. A. S. Sood of Kampala, for instance, assumes that all the Luzira men are Uganda citizens. My information is that the majority of them are not and it is this lot that the Government should consider packing off. The question of deporting Uganda citizens does not arise.

I understand that the men recently convicted of forgery and conspiracy are all (except perhaps an odd exception) non-citizens. Forgery on the scale perpetrated by these men has hitherto been unknown in Uganda. In fact, I would consider this a crime against the nation.

These men, who are to all intents and purposes aliens, are a menace and it would be wrong for the authorities to let them loose on society after their terms have expired. This time they forged only Congo currency, next time it may be East African notes.

If Mr. Sood is looking for precedents, Britain and America, two of the pioneering countries in the rehabilitation of criminals, have not hesitated in deporting undesirable aliens, including the notorious Messina brothers and Mafia killers.”

Mr. Kapila, who appears for the plaintiffs in Suits Nos. 581/66 and 621/66, opened at some length and dealt only with the question of liability. In his opening he referred to the law affecting the two issues, upon which a decision for the moment is required. Mr. Dalal, who appears for the plaintiff in Suit No. 91/67, associated himself with the submissions of Mr. Kapila. After Mr. Kapila had called three witnesses and, before he closed his case, Mr. Keeble for the defendants, in my view, quite rightly and properly conceded that the answer to issue 1. is in the affirmative in respect of all three publications. He, however, intimated that he wished to address the Court briefly on the issue of fair comment. In view of the stand taken by learned counsel for the defendants, and with which I agree entirely, the first issue is resolved in favour of the plaintiffs and the only issue remaining which affects liability is issue No. 2. (fair comment). No evidence was called for the defendants.

The plea in respect of each publication is what is commonly called the “rolled-up plea”. In *Digby v. Financial News Ltd.*, [1907] 1 K.B. 502, a portion of the headnote reads:

“The defence to an action for libel in a newspaper article that ‘in so far as the words consist of statements of fact, the same are in their natural and ordinary signification, true in substance and fact, in so far as they consist of comment, the same were fair and bona fide comment upon a matter of public interest’ is a defence of fair comment and not a justification.”

I think it is now trite law that a plea of fair comment is different from that of a plea of justification. It is quite true that although this is so, the defendants are entitled to prove and indeed must prove, that the facts on which their comments are based are true, notwithstanding such facts are defamatory of the plaintiff; and that is so even where there is no plea of justification. Now, the two defences (fair comment, and justification) are similar to this extent – that in a plea of fair comment the defendant must show that there is a *foundation of facts well and truly laid* on which the comment is based, but conclusions inferred as matters of opinion have not to be proved as facts. On the other hand, the mental attitude of the commentator is material to the issue of fair comment, but immaterial to the issue of justification.

In *Digby v. Financial News Ltd.*, Collins, M.R., said ([1907] 1 K.B. at p. 508):

“It is therefore a necessary part of a plea of fair comment to shew that there has been no mis-statement of facts in the statement of the materials upon which comments were based.”

In *Peter Walker v. Hodgson*, Buckley, L.J., said ([1909] 1 K.B. at p. 255):

“To prove his defence of fair comment it is essential, as I understand the authorities, that [the defendant] should first shew that the statements of fact which he made were . . . true.”

In *Kemsley v. Foot*, Lord Porter said ([1952] 1 All E.R. at p. 507):

“In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist, the foundation of the plea fails.”

Finally, in *Joynt v. Cycle Trading Publishing Company*, Kennedy, J., said ([1904] 2 K.B. at p. 294):

“. . . the comment must . . . not mis-state facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further, it must not convey imputations of an evil sort, except so far as the facts truly stated, warrant their imputation.”

To succeed in a defence of fair comment, the words “complained of” must be shown to be: (a) comment, (b) fair comment, (c) fair comment on some matter of public interest, At the trial it is incumbent on a defendant to prove (1) that each and every statement of fact in the words complained of is true and (2) that the comment on the facts so proved was bona fide fair comment on a matter of public interest. If a defendant fails to prove the truth of any of the statement of facts, he fails in his defence.

We must now advert to the publications exhs. 3, 4, and 5.

It is not in dispute that the plaintiffs were on May 19, 1965 convicted by the district court of Mengo, at Kampala, of conspiracy contrary to s. 373 of the Penal Code. To be more exact, it was alleged that they had conspired together to forge Rwanda/Burundi 1,000 franc currency notes. In addition, the second plaintiff, who was the first accused, was charged on a second count under s. 344 (d) of the Penal Code of possessing a plate for forging currency notes of that description. He was also convicted of that offence. They were all sentenced to two years’ imprisonment. They appealed against their convictions and sentences. They were successful, the High Court on July 28, 1965 having allowed their appeals. Now, on May 20, 1965, the day following their conviction, a report of their conviction appeared in the “Daily Nation” (exh. P.2.). Two days later, on Saturday afternoon or evening, the “Sunday Nation” of May 23, (exh. P.3.) appeared with the first of three publications. The next publication appeared in the same paper of June 6; and the third on June 13. It has, as we have seen, been conceded that all three publications referred to the three plaintiffs. They are all Asians. Now the article in exh. P.3. commences with this paragraph:

“About 25 Asians are now getting ‘free board and lodging’ in Uganda’s biggest prison – Luzira. Half of them went in this year on charges ranging from smuggling, forgery, and corruption, to gun running.”

It goes on to say that crime is not, of course, confined to any particular community, but the Asian has to be doubly careful because he is a non-indigenous member of the community.

Mr. Kapila complains in particular of the second and final paragraphs where it is stated respectively (a) “the majority of law abiding Asians here feel that they have been let down by these rogues”; (b) “and the rogues who have been jailed should be deported by the Uganda Government to India or Pakistan (as the case may be) after they have served their terms”. He submits “acts of crime” and “rogues” are questions of fact.

In exh. P.4. he submits the reference to “undesirable aliens” is a mixture of fact and opinion.

He submits the third publication (exh. P.5.) is the clearest and most virulent. “Forgery” and “Forgery . . . perpetrated”, “crime against the nation” (asserting fact after commission of crime), are matters of fact. He submits further that the following words: “This time they forged only Congo currency. Next time it may be East African notes”, is a clear statement of fact.

Now, the fact that a plaintiff has been convicted of an offence is not admissible in evidence in support of a plea of justification. *Hollington v. Hewthorn*, [1943] 1 K.B. 587 (C.A.); *Hinds v. Sparks*, [1964] Crim. L.R. 717. For the plaintiffs it has been said that if an article confines itself to say that an individual has been convicted of an offence which is fact he has been, it is a fact which can easily be justified by producing proof; but if one asserts a person has committed an offence basing it on the fact that he has been convicted of it, then the conviction does not justify the statement that he has committed it. Mr. Kapila agrees that if one accuses another of an offence you cannot rely on a conviction to establish the fact that the offence was committed. He also accepts as good law

that for a defence of fair comment to succeed, the facts upon which the comments are made must be accurately stated.

It can be said with correctness, that it is tacitly assumed that during the material time of the publication of the articles, the three plaintiffs were in prison at Luzira. Indeed Mr. Kapila agrees that it is so.

Mr. Kapila says the statement in exh. P.3. which reads: "About 25 Asians are now getting 'free board and lodging' in Uganda's biggest prison – Luzira", is accepted as true. I do not think it is contended as not being truly stated. But the article does not end there. The article goes on to speak of "forgery", "these rogues", and "these acts of crime". It is submitted on behalf of the defendants that "the forgery" does not necessarily refer to the plaintiffs. It cannot be contraverted that the plaintiffs were amongst the 25 Asians. This we know – the plaintiffs had not been convicted of forgery, which is an offence punishable under various sections of the Penal Code, depending on its gravity. Still less, could it be said that they had committed forgery. During his argument on issue 1, Mr. Kapila submitted that it is no answer to the plaintiffs' claim that the articles could also be taken to refer to a fourth individual in Luzira prison. He went on to say that they were not concerned with another individual outside the plaintiffs, who has or has not a cause of action. This submission, in my view, is not inappropriate in considering whether forgery as stated in exh. P.3. could be taken to refer to the plaintiffs. In my opinion it could be so taken, having regard to the surrounding circumstances of the case. To say of the plaintiffs that they had been convicted of or committed forgery, is not a fact which is truly stated. Be that as it may, it is observed that the author has used the word "rogue" twice in exh P.3. It has been submitted that it is only a term of abuse and that it is common usage to refer to the prison population of a country as rogues. As I understand it, the word means a rascal, swindler, knave, arch, or sly person and in the case of children, a mischief-loving child. In the whole context of the article, the use of the word is more than abuse. As has been pointed out, no evidence at all has been led by the defendants and there is no evidence to support the statement as being true. In para. 4 there is the phrase "acts of crime". Mr. Keeble has referred me to the definition of crime in The Shorter Oxford Dictionary, where the word is defined as: 1. an act punishable by law, as being forbidden by statute or injurious to the public welfare (commonly used only of grave offences); 2. an evil or injurious act, a (grave) offence, a sin; 3. charge or accusation. In my view, it would be straining the language to say that the phrase in its context, as it were suggesting that the Asian leaders should condemn publicly these *acts of crime* and appealing to the general Asian public to co-operate fully with the police with information about any illegal activities by individuals amongst the community, does not refer to the commission of crime. Ordinary men of ordinary intelligence, with his ordinary man's general knowledge and experience of wordly affairs could be likely to understand the phrase as meaning the commission of crime. What is an "act"? It is a thing done, deed. The onus is on the defendants to justify the facts. There is no evidence that the plaintiffs have done any crime, in other words have committed any crime. The fact has not been truly stated.

As to exh. P.4. Mr. Keeble submits there is nothing defamatory or derogatory in the term "undesirable aliens"; and that "undesirable" only repeats the views expressed by the defendants in exh. P.3., that is to say, a person convicted on a serious crime is an undesirable person and should be deported. Is that the tenor of exh. P.3.? As I have already said it speaks of "acts of crime", which is the doing of crime "or deed of crime" – there is nothing to suggest that the writer was basing his views on "conviction" as opposed to the *commission* of crime. It is further submitted there is nothing defamatory or derogatory in the term "undesirable aliens". It has been pointed out on behalf of the plaintiffs that it

is not an issue for it has not been pleaded that any of the publications is not libellous – the only issue being not defamatory on the plaintiffs, and fair comment. This article contains a mixture of fact and comment. To justify the phrase “undesirable aliens”, evidence would have to be led by the defendants that they are undesirable. I do not think it would be sufficient to say that they are “undesirable” because another court at one time convicted them and by that token they are undesirable. It must be proved. I am inclined to think that the word “aliens” could be construed as meaning “non-citizens”. Mr. Kapila in his address says that evidence would be led (but of course the turn of events was such that it became unnecessary for him to lead further evidence) to elaborate the background of his clients; and he added the first plaintiff was a third generation Ugandan, not in the sense of citizenship. Would it be necessary now, in the circumstances, for the defendants in so far as the first plaintiff is concerned, to lead evidence that he is in fact a non-citizen? Be that as it may, certainly the defendants have not proved the statement that any of these plaintiffs are undesirable; and in any event there is no proof that at least either any of the other two are non-citizens.

Exhibit 5., the third and last publication in point of time, in the beginning of the third paragraph refers to “the men recently convicted of forgery and conspiracy . . .”. It is a fact truly stated that they were convicted of conspiracy; but definitely not of forgery (see exh. P. 1. Court Record). It cannot be said that the fact of conviction for forgery has been justified – clearly not. Then the article continues “forgery on the scale perpetrated by these men has hitherto been unknown in Uganda”. “Forgery perpetrated” is a statement of fact. “Forgery” alone used again here is a fact which is not truly stated; and the phrase in combination “forgery perpetrated” is obviously a mis-statement of fact. Here it is being said that these men have “perpetrated forgery”, in other words have committed the forgery. There is no such proof. The phrases “unknown in Uganda” and “scale” may be regarded as fair comment. The words “In fact, I will consider this a crime against the nation” would appear to be comment putting it at its highest in favour of the defendants, but the status of fair comment could not be attributed to it, as the facts on which the comment purports to be made do not exist. Mr. Kapila correctly says it is difficult to classify whether the words “These men . . . a menace” are fact or opinion. The words “It would be wrong . . . to let them loose on society . . . expired” constitute opinion. After that, comes the words which have been described by Mr. Kapila as a clear statement of fact, and even Mr. Keeble refers to them as the gravamen of para. 4. They are “This time they forged only Congo currency, next time it may be East African notes”. To say that the plaintiffs forged Congo currency notes, or for that matter any currency notes, is not a true statement of fact. It has not been justified. Mr. Kapila is quite right in saying that this last publication is the clearest and most virulent. There is not an iota of evidence that the plaintiffs committed forgery, or forged currency notes. The defendants have not given any evidence whatsoever to support any of these statements as being true.

Even if the plaintiffs had been convicted of forgery, as we have seen, that conviction would be irrelevant, unless the defence proved in court that the plaintiffs in fact *committed* the offences.

The limits of criticism are exceedingly wide. Comments must be published honestly in that it is the expression of the defendant’s real opinion. If the language complained of is such as to be fairly called criticism, the mere circumstance that it is violent, exaggerated, or even in a sense unjust, will not render it unfair: *Gatley on Libel and Slander* (6th Edn.), para. 729. It has been said honesty is the cardinal test. In *Turner v. M.G.M.*, Lord Parker said ([1950] 1 All E.R. at p. 461):

“... the question is not whether the comment is justified in the eyes of the judge or jury, but whether it is the honest expression of the commentator’s real view and not merely abuse or invective under the guise of criticism.”

It was submitted on behalf of the plaintiffs that even if the facts were right, they would have had an answer to fair comment for the comments are anything but fair. It was said that to say this time they forged only Congo currency, next time it may be East African notes is speculating that the offence will be committed in the near future by people of hitherto good character; and to liken “these men” as hardened criminals like Messina and Mafia killers cannot be fair comment. Be that as it may, in my view the defendants have failed to prove statements of facts as true to which I have referred in exhs. P.3, 4, and 5; and that being so, the plea of fair comment fails. In the result the defendants are liable to each of the plaintiffs in respect of each publication. There will be judgment for the plaintiffs against the defendants jointly and severally, subject to disposal of issues 3 and 4.

Order accordingly.

For the first two plaintiffs:

SK Kapila and JC Patel

Patel and Mehta, Kampala

For the third plaintiff:

SH Dalal

Dalal and Singh

For the defendants:

OJ Keeble

Hunter and Greig, Kampala

Okech and another v Republic [1968] 1 EA 508 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	28 June 1968
Case Number:	53/1968 (87/68)
Before:	Sir Charles Newbold P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Ainley, CJ and Farrell, J

[1] *Criminal Law – Demanding with menaces – Appellants threatening shop cleaner to make him steal – Trap laid for appellants – Goods in shop pointed out by appellants for cleaner to hand over – Whether*

offence committed as charged – Whether possession or control required in cleaner – Penal Code, s. 302 (K.).

Editor's Summary

A shop cleaner was approached by the appellants who threatened to have him run over by a motor-car if he refused to steal articles from his employer's shop and sell them to the appellants at greatly reduced prices. The cleaner reported the incident to his employer and two police constables hid in the shop. The first appellant entered the shop and indicated various items of clothing to the cleaner. The policemen thereupon arrested him and subsequently arrested the second appellant. The appellants were convicted by the senior resident magistrate, Nairobi, of the offence of demanding property with menaces with intent to steal, contrary to s. 302 of the Penal Code. The convictions were upheld on first appeal by the High Court and the appellants then brought this second appeal to the Court of Appeal.

Held –

- (i) in determining the question of intention to steal in a charge of demanding with menaces, the court may look to see what the position would have been had the demand been successful;
- (ii) if necessary, the court may apply s. 20 of the Penal Code, although the offence was not completed, to ascertain whether the accused would himself,

in law, have been guilty of stealing (*Kabunga's* case (1) distinguished, *R. v. Patel* (2) followed).

- (iii) although the complainant was a cleaner and as such not the owner or in special possession or control over the goods demanded, it was sufficient if the goods were accessible or available to him so as to enable him to pass on the goods so that they could be stolen from the owner.

Appeal dismissed.

Cases referred to in judgment:

- (1) *Kabunga s/o Magingi v. R.* (1953), 22 E.A.C.A. 387.
- (2) *R. v. Patel and Patel* (1944), 13 E.A.C.A. 179.
- (3) *R. v. Walton and Ogden* (1863), Le. & Ca. 288; 169 E.R. 1403.

Judgment

Law JA: read the following reasons for the judgment of the Court: These are second appeals. The appellants were convicted by the senior resident magistrate, Nairobi, of the offence of demanding property with menaces with intent to steal, contrary to s. 302 of the Penal Code. They appealed to the High Court (Ainley, C.J. and Farrell, J.). When the hearing of the appeal began, Mr. Hobbs for the Republic stated to the Court that he did not support the convictions of the two appellants. After hearing Mr. Rao and Mr. Makhecha for the appellants, the learned judges delivered a carefully considered reserved judgment, in which they held that the convictions were good, and they dismissed the appeals. The appellants then appealed to this Court, and we had the advantage of hearing thorough and able arguments on the points of law involved in this appeal from Mr. Rao and Mr. Makhecha for the appellants and Mr. Potter, Q.C. for the Republic. At the close of the arguments we dismissed the appeals and stated that we would give our reasons for doing so in writing. This we now do. The facts are not in dispute and can be stated briefly as follows: one Mburu (hereinafter referred to as the complainant) was a cleaner employed in a shop known as "Deacon's". He was approached on several occasions by the two appellants, who asked him to steal articles of clothing from the shop and sell them to the appellants at greatly reduced prices. The complainant refused to do so, whereupon the appellants threatened to have him run over by a motor car if he did not comply with their wishes. The complainant being frightened by this threat reported the matter to his superiors who sent him to the police. Two constables hid in the shop. They saw the first appellant come in and point out various items of clothing to the complainant, whereupon they came out of hiding and arrested the first appellant. The second appellant was arrested elsewhere shortly afterwards.

Mr. Rao submits that on these facts the appellants may have been guilty of some offence, such as uttering threats to kill contrary to s. 223 of the Penal Code, or soliciting to commit an offence, contrary to s. 391 of the Penal Code, but that they are not guilty of the offence charged, as they had no intention to steal, but an intention to receive stolen property. The High Court surmounted this difficulty by saying that if the offence had been completed, the appellants would have been principal offenders by reason of s. 20 of the Penal Code as persons who had counselled or procured the commission of the offence of theft by the complainant. Mr. Rao objects to this reasoning on the ground that s. 20 has no applicability until an offence has been committed, and that it cannot be used to determine the intention of persons in relation to an uncompleted offence. He relies in this respect on *Kabunga s/o Magingi v. R.* (1953), 22

E.A.C.A. 387, in which it was

held that s. 22 of the Tanganyika Penal Code (which corresponds with s. 20 of the Kenya Penal Code) applies only where an offence has been committed. All that was decided in *Kabunga's* case was that s. 22 of the Tanganyika Penal Code cannot be used to convict an accessory before the fact as a principal offender on a charge of attempting to commit an offence which was not actually completed. It is no authority for the proposition that the section cannot be used, in the case of an uncompleted offence, to determine what was a person's intention in relation to that offence when charged with the offence of demanding property from any person with menaces with intent to steal. Mr. Potter submits that the High Court was entitled to consider whether, if the offence had been completed, the appellants would have been guilty of stealing as principals under s. 20 of the Kenya Penal Code. He relies on *R. v. Patel and Patel* (1944), 13 E.A.C.A. 179, in which this Court quoted with approval the following extract from the judgment in the English case of *R. v. Walton and Ogden* (1863), 169 E.R. at p. 1403:

“... a demand for money with intent to steal, if successful, must amount to stealing.”

We agree. We consider that in determining the question of intention to steal in a charge of demanding with menaces, a court may look to see what the position would have been had the demand been successful, and if necessary apply s. 20 even though the offence was not completed to ascertain whether the accused would, in law, himself have been guilty of stealing.

Mr. Rao's second main submission is that on the facts of this case the complainant was not the owner or special owner having possession or control over the goods demanded. He submits that no offence is committed against s. 302 of the Penal Code unless the person from whom the demand is made is such an owner or special owner. Section 302 reads as follows:

“302. Any person who, with intent to steal any valuable thing, demands it from any person with menaces or force is guilty of a felony . . .”

Mr. Rao submits that the complainant in this case was not in possession actual or constructive of the articles demanded, so that even if the articles had been obtained from him, this would not have amounted to stealing. Obviously no offence would be committed under s. 302 if a demand were made of a person who had no physical control or power over the goods; demanded, as for instance if a demand with menaces were made of a passer-by in the street for the Crown jewels. We agree with Mr. Rao that the High Court twice misdirected itself in referring to the complainant as a shop assistant, whereas in fact he was a cleaner. A shop assistant has authority to dispose of goods for the purpose of sale and to that extent has possession or control over the goods; a cleaner has no such authority. But we agree with Mr. Potter that this misdirection was immaterial in the circumstances of this case. The right test in our opinion is not whether the person to whom the demand is made was necessarily the owner or special owner of the goods. It is sufficient if the goods were accessible or available to him so as to enable him to pass on the goods so that they could then be stolen from the owner. We are satisfied that the complainant was such a person, and that in his capacity as a cleaner in the shop he had access to the goods which the appellants intended to steal.

Mr. Makhecha for the second appellant associated himself with Mr. Rao's submissions and made the additional point that there was insufficient evidence that his client had associated himself with the demand, as he was not present in the shop when the first appellant was selecting the articles to be stolen. The second appellant was present when the demands were made, and we see no reason on

the evidence to think that he ever withdrew from the joint venture with the first appellant and ceased to act in concert with him.

For these reasons we dismissed the appeals of both appellants.

Appeals dismissed.

For the first appellant:

SS Rao

AR Kapila & Co, Nairobi

For the second appellant:

HP Makhecha

HP Makhecha & Co, Nairobi

For the respondent:

KC Potter, QC and HGD Graham

Attorney-General, Kenya

Onama v Uganda Argus Ltd [1968] 1 EA 511 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	20 June 1968
Case Number:	524/1966 (93/68)
Before:	Mead, J
Sourced by:	LawAfrica

[1] *Defamation – Libel – Qualified privilege – First statement privileged – Second statement referring to first – Whether second statement defamatory.*

[2] *Defamation – Damages – Allegation that Minister abused his position – Judge’s observations as to quantum if plaintiff succeeded.*

[3] *Damages – Defamation – Allegation that Minister had abused his position – Judge’s observations as to quantum if plaintiff succeeded.*

Editor’s Summary

The plaintiff was allegedly defamed by a former member of the Uganda Parliament during the course of a debate in the National Assembly and the alleged statement was subsequently reported by the defendant’s

newspaper on February 5, 1966. The member of parliament concerned was alleged to have stated that the plaintiff had benefited from "loot" of ivory and gold to the value of Shs. 2½ million brought out of the Congo by Uganda soldiers and that the plaintiff was responsible for the "looting". There were further allegations of benefits from the loot being received by other members of the Government and of an alleged plot to overthrow the Uganda Constitution. These allegations were reported by the defendant's newspaper and the defendant claimed that, as a fair and accurate report of parliamentary proceedings, the publication was privileged. On February 12, the same member of parliament called a press conference, stating that he was doing so because he had checked and re-checked his information and was convinced that certain individuals had personal interests in the conflict going on amongst the Congolese peoples. These reasons were reported by the defendant's newspaper and the report then set out in detail the member's proposals for a commission of inquiry to investigate four questions. At no stage did the second report refer to the plaintiff. The plaintiff's claim was based upon an innuendo, in that the publication of February 12 was defamatory of the plaintiff by reason of its reference to the publication of February 5. The plaintiff called one witness, the Chief Service Officer to the Government, who gave evidence to the effect that on reading the second report, he understood it to mean that the press conference was called by the member concerned to answer a challenge put to him by the plaintiff in the House of Assembly to repeat his allegations outside the House and that, on reading the statement that the member had checked and re-checked his information, his conclusion was that the report meant that the member was repeating the allegations which he had made in parliament.

Held –

- (i) The principles in the English cases admitting publications other than that relied upon by the plaintiff applied to the present case, although the initial publication in the present case was a privileged one (*Webb's* case (1), *Astaire's* case (2) and *Wheeler's* case (3) adopted);
- (ii) the plaintiff was entitled to refer to the initial publication to show that the allegations made therein were repeated in the publication in issue;
- (iii) the statements made in the initial publication were not necessarily implied into the subsequent publication and it was only because of the special position of the witness that he concluded that the statement in issue referred to the plaintiff;
- (iv) by themselves, the words complained of in the publication before the court were not defamatory of the plaintiff.

Plaintiff's claim dismissed with costs to the defendant.

[The learned judge observed that had he found for the plaintiff, he would have assessed damages at Shs. 50,000/-.]

Cases referred to in judgment:

- (1) *Webb v. Times Publishing Co. Ltd.*, [1960] 2 All E.R. 789.
- (2) *Astaire v. Campling and Another*, [1965] 3 All E.R. 666.
- (3) *Wheeler v. Somerfield and Others*, [1966] 2 All E.R. 305.

Judgment

Mead J: The plaintiff claims damages against the defendant for alleged defamation arising out of the publication by the defendant, as the proprietor, printer and publisher of the daily newspaper the "Uganda Argus", of a report in the "Uganda Argus" of February 12, 1966 of a press conference given by one, Mr. Daudi Ocheng, then a member of parliament, since deceased. The words complained of were spoken by Mr. Ocheng and reported by the defendant. The plaintiff in his amended plaint avers that these words implicitly reiterated allegations made by Mr. Ocheng in parliament concerning the plaintiff on February 4, 1966, which allegations were reported in the defendant's newspaper of February 5, 1966. The defendant admits the two publications. The defendant contends that:

- 1. The publication of February 5 being a fair and accurate report of parliamentary proceedings and published without malice is protected by qualified privilege.
- 2. The second publication of February 12 is not in its natural and ordinary meaning defamatory nor is it capable of bearing any meaning defamatory of the plaintiff.
- 3. The plaintiff is not entitled in law to refer to and rely upon the first publication of February 5 in support of his averment that the publication of February 12 is defamatory of the plaintiff.

The defence as filed raised a plea of absolute privilege but on an application by learned counsel for the defendant for leave to amend, although made after the close of the plaintiff's case and after plaintiff's counsel had completed his address, I allowed the application to substitute a plea of qualified privilege. It

was conceded by counsel for the plaintiff that if the publication of February 5, 1966 were privileged the privilege would be qualified.

In the publication of February 12, upon which the plaintiff relies, it is reported by the defendant that Mr. Ocheng said he was holding the press conference as a reply to a challenge by the Minister of Defence, the plaintiff, that he would not repeat his allegations outside the House. There is no reference in the publication of February 12 to the publication of February 5, nor is there any reference therein

as to what were those allegations. In order to know what those allegations were the reader must have read or must refer to the previous report of February 5. Mr. Ocheng is then reported, in the issue of February 12, as saying:

“The reason that I have done this [that is called, the press conference] is because I have checked and cross-checked my information and have been convinced that the sons of Uganda who were killed in the Congo were killed not in the defence of our territorial integrity, but because certain individuals had personal interests in the conflict that was going on between the Congolese peoples themselves.”

In his amended plaint at para. 6 (i) the plaintiff avers that Mr. Ocheng’s words, “I have checked and cross-checked my information”, meant and were understood to mean that the allegations made by Mr. Ocheng on February 4, published by the defendant on February 5, had been checked and re-checked by Mr. Ocheng and were true and therefore implicitly reiterated by Mr. Ocheng outside Parliament. In para. 6 (i) of his amended plaint the plaintiff sets out Mr. Ocheng’s original allegations as being:

- (a) That the plaintiff had benefited from a “loot” by Uganda soldiers of ivory and gold in the Congo, valued at Shs. 2½ millions.
- (b) That the plaintiff was responsible for acts of loot and plunder of gold and ivory in the Congo by Uganda soldiers.

I find that the allegations made by Mr. Ocheng as reported by the defendant on February 5, in so far as they concern the plaintiff, were:

- 1. That members of the Government together with a high ranking Army officer, were involved in a planned coup to overthrow the Uganda Constitution,
- 2. That three ministers had received large sums of money from gold and tusks from the Congo,
- 3. That as a result of activities in the Congo the Minister of State for Defence, the plaintiff, and two other ministers shared a sum of Shs. 2½ million,
- 4. That Colonel Amin had received a gratuity of Shs. 340,000 as a result of activities in the Congo, and the reason why Colonel Amin had not been brought to justice was because if he were court-martialled he would reveal the amount of gold and ivory taken by the plaintiff and the other ministers.

In the publication of February 12, after reporting the reason as given by Mr. Ocheng for holding the press conference, Mr. Ocheng is reported as having posed four questions (these are set out in detail) which he said the people of Uganda would like the commission mentioned in parliament to investigate. Mr. Ocheng is then reported as commenting that the Prime Minister and the Minister of Defence, the plaintiff, were both members of the Defence Council and therefore when the Commission was appointed these two ministers should not be concerned. Mr. Ocheng added that he personally would find it extremely difficult to advise his sources of information to give evidence to a commission appointed by a body of which the Prime Minister and Minister of Defence were members.

The plaintiff himself did not give evidence but called as his witness Mr. Akena-Adoko, Chief General Service Officer to the Government. In his evidence Mr. Akena-Adoko said that on reading the report of the press conference in the “Uganda Argus” of February 12 he understood it to mean that Mr. Ocheng had called the conference in answer to the plaintiff’s challenge and that when Mr. Ocheng is reported as saying he had checked and cross-checked Mr. Akena-Adoko said he thought Mr. Ocheng was referring to the plaintiff and the other ministers

sharing the Shs. 2½ million. Mr. Akena-Adoko said he understood the report to mean that Mr. Ocheng had not withdrawn his accusations made in parliament but was repeating all the accusations. Mr. Akena-Adoko said that he understood Mr. Ocheng's words as reported in the issue of February 12 to mean substantially what is set out in sub-para. (i) and sub-paras. (ii) – (viii) of para. 6 of the amended plaint. The averments set out in para. 6 of the plaint to which I have referred were not put specifically to Mr. Akena-Adoko. I have referred to them thus to shorten my summarising of Mr. Akena-Adoko's evidence in which he explained how the words had been understood by him. In cross-examination Mr. Akena-Adoko said he did not think it wrong that the report of February 5 had been published and he considered it should be privileged. Mr. Akena-Adoko said it was clear to him from the publication of February 12 that the plaintiff's challenge had been that Mr. Ocheng should repeat all the allegations he had made in parliament. Mr. Akena-Adoko said he inferred that Mr. Ocheng had repeated all the allegations. He conceded that Mr. Ocheng did not specifically mention any names but Mr. Akena-Adoko said it was not necessary for Mr. Ocheng to mention any names because he had named the certain individuals in parliament. By reference to "certain individuals" Mr. Akena-Adoko was referring to para. 7 of the publication of February 12. He said it did not occur to him to consider who those persons were, it was so well known that it was superfluous to name them.

The expressed purpose of Mr. Ocheng calling a press conference was as a reply to the plaintiff's challenge that Mr. Ocheng would not repeat the allegations made in parliament on February 4 outside the House. It is conceded by the plaintiff that those allegations are not expressly repeated in the statement made by Mr. Ocheng at the press conference as reported in the issue of February 12. Mr. Akena-Adoko gave evidence as to his understanding of what was published. Daily circulations of the defendant's "Uganda Argus" was agreed at the commencement of the hearing of this action to 20,000 with an estimated reading by 100,000 people. Sitting as I am as both judge and jury I have to consider the effect of this publication upon the mind of the reasonable man. The plaintiff's only witness Mr. Akena-Adoko is a person in government service and secretary to the Security Committee. It is obvious from his evidence that he had a close knowledge of public matters occurring at the time about which the allegations were made. I have no hesitation in saying that Mr. Akena-Adoko gave his evidence honestly, and I am certain that the opinion he expressed was his genuine opinion. I have, however, to consider the effect of the publications upon the general public as exemplified by the reasonable man, and to consider whether Mr. Akena-Adoko is representative of the reasonable man, as defined at law.

The defendant contends that the plaintiff is not entitled to rely upon the publication of February 5 on the ground that that publication is privileged. I have been referred to the judgments in *Webb v. Times Publishing Co. Ltd.*, [1960] 2 All E.R. 789; *Astaire v. Campling and Another*, [1965] 3 All E.R. 666, and *Wheeler v. Somerfield and Others*, [1966] 2 All E.R. 305. These are decisions in libel actions concerning the admissibility of publications other than the publication upon which the plaintiff relies to substantiate the plaintiff's claim of defamation arising out of the publication on which he relies. I have not been referred to and I have not myself been able to find any comparable East African reports. The reports to which I have been referred are not instances of secondary publications having been made, as in the present case, by the defendant, but in my view the principles expressed in those cases apply to this present case. The first publication of February 5 reports Mr. Ocheng's allegations made in parliament. There is no evidence that the report is not fair and accurate or that in publishing the report the defendant was actuated by malice. I hold that the publication of the report of February 5 is privileged at common law. Had it not been for the privilege accorded the publication of February 5 I have little doubt the plaintiff

would have founded his action on that publication and not on the publication of February 12.

Mr. Ocheng was challenged by the plaintiff to repeat his allegations outside the House. By his statement to the press reported in the publication of February 12 it is contended by the plaintiff that Mr. Ocheng repeated, by implication, those allegations. I hold that the plaintiff is entitled to refer to the publication of February 5, 1966 provided the plaintiff can show that in the report published on February 12, 1966 in respect of which this action is brought the allegations made by Mr. Ocheng as reported in the defendant's issue of February 5 are expressly or impliedly repeated, approved or adopted by Mr. Ocheng. The plaintiff concedes there is no express repetition, approval or adoption. I have to consider whether such is implied.

In his opening remark to the press conference Mr. Ocheng said he was holding the conference in reply to the plaintiff's challenge. Bearing in mind this challenge Mr. Ocheng said he was answering, the reader, being alerted by Mr. Ocheng's statement of having checked and cross-checked his information, would then expect to read the result thereof. The result as reported is that Mr. Ocheng had come to a conviction as to soldiers having been killed and that certain individuals were responsible. Mr. Ocheng did not name those individuals. In so stating Mr. Ocheng had departed from his allegations reported in the issue of February 5, and to which I have already made reference. In that issue Mr. Ocheng is not reported to making mention of Ugandan soldiers being killed. In my view his reference to "certain individuals" indicates that Mr. Ocheng as a result of his checking and cross-checking, could not or was not prepared to name either the plaintiff or the other ministers he had previously named in the course of the parliamentary proceedings as being those certain individuals. Mr. Ocheng then posed four questions; these are not rhetorical questions and the plaintiff's name or association cannot be implied in answer to those questions. For answers Mr. Ocheng looks to the commission appointed by parliament.

I have carefully considered the evidence of Mr. Akena-Adoko concerning his understanding as to the meaning of Mr. Ocheng's statement to the press as published by the defendant on February 12. As I have said previously I have to consider whether his opinion is that of the reasonable man. I find, with all due respect to Mr. Akena-Adoko, that in his position as a civil servant, and in contact with the plaintiff in the latter's capacity as Minister of Defence, and that as secretary to the Security Committee, Mr. Akena-Adoko was in a special position as compared with the ordinary man and cannot be regarded as being truly representative of the reasonable man. In my view Mr. Akena-Adoko's impression must have been, quite unwittingly, influenced by his personal knowledge. I find that far from answering the plaintiff's challenge by repeating the allegations he had made in the House, Mr. Ocheng departed from those allegations making a new allegation concerning soldiers being killed and raising queries on points he said the people of Uganda would like to have answered. In his reference to "certain individuals" in connection with soldiers being killed and to the persons responsible for the illegal importation of gold Mr. Ocheng does not expressly name any person. To find the identity of those persons the plaintiff cannot turn to the publication of February 5. First, because Mr. Ocheng as reported by the defendant in its issue of February 5 had made no reference to such killing. Secondly, because it cannot be said that in stating "They would like to know what steps the government took to arrest the persons responsible for importing gold illegally into the country" he is repeating, adopting or approving the allegation that three ministers received large sums of money from gold and tusks from the Congo. The test is not whether it can reasonably be implied from the publication of February 12 that Mr. Ocheng was therein referring to the persons he named in the House, as reported by the defendant in the

privileged newspaper issue of February 5, although in applying that test in my view there is no such implication, the test is whether Mr. Ocheng himself by the words he used at the press conference as reported by the defendant in the issue of February 12 impliedly repeated, adopted or approved his previous privileged allegation or allegations as reported. Mr. Akena-Adoko in cross-examination said the himself inferred that Mr. Ocheng at his press conference was referring to the plaintiff and the two other ministers because Mr. Ocheng had previously named the plaintiff and the other ministers in parliament, and that in his, Mr. Akena-Adoko's, opinion it was superfluous for Mr. Ocheng to name the plaintiff and the other ministers. In my view it is clear from Mr. Akena-Adoko's evidence that he read into the report of February 12 the names of the plaintiff and the other ministers not by reason of anything Mr. Ocheng had said that implied a repetition, adoption, or approval of Mr. Ocheng's previous statement but because, by reason of the allegations made in parliament, the plaintiff and the other two ministers had become the subject of public talk. I find that Mr. Ocheng did not, in the press conference as reported by the defendant on February 5, either expressly, which is conceded by the plaintiff, or impliedly repeat, adopt or approve the allegations made by as reported by the defendant in the issue of February 5. I therefore hold that the plaintiff is not entitled to rely on the publication of February 5 to establish the identity of the plaintiff as one of the persons referred to in the publication by the defendant of February 12. I find that in itself the publication of February 12 does not so identify the plaintiff, and that the words complained of in the publication of February 12 are not in themselves defamatory of the plaintiff. I dismiss the plaintiff's claim with costs to the defendant.

Had I found for the plaintiff it would then have been necessary for me to consider the quantum of damages to which the plaintiff would have been entitled. The plaintiff is a Minister of State now holding the same office as at the time of the alleged defamation. The fact that the plaintiff has not suffered loss of office should not, in my view, affect his claim for damages. Mr. Akena-Adoko in his evidence said that the effect upon him of the report of February 12 was to make him believe the plaintiff was responsible for murders and looting, and that the plaintiff had misused his position for his personal benefit. It is conceded that the defendant's newspaper has a daily circulation of 20,000 copies and an estimated reading by 100,000 persons. In cross-examination Mr. Akena-Adoko said the people of Uganda did not want to know the answers to the questions posed by Mr. Ocheng concerning fighting between Uganda and the Congo and the killing of soldiers because the people had been satisfied by a statement the government had made on these subjects that Ugandan troops had been properly used. In the absence of any evidence, other than that of Mr. Akena-Adoko, as to the effect upon the minds of the readers of the defendant's newspaper in general, it is difficult for me to assess what that effect may have been particularly having regard to Mr. Akena-Adoko's evidence to which I have just referred. In the absence of any evidence that a government statement was issued concerning the allegation made by Mr. Ocheng that the plaintiff and two other ministers had received large sums of money from gold and tusks from the Congo, that the plaintiff and those ministers had shared Shs. 2½ million, that members of the government were involved in a planned coup to overthrow the constitution, I must assume no statement was made. As regards the allegation concerning the overthrow of the constitution the plaintiff and other ministers were not expressly named as being participants but in my view the association of their names in the same paragraph as that reporting the alleged planned coup would lead a reasonable man to think they were in fact participants. From those allegations the innuendoes set out in the amended plaint in para. 6 (vii) and (viii) would be justified, namely:

- (vii) That the plaintiff had abused his position of a minister and his other officers for the sake of his personal gain.
- (viii) That the plaintiff was unfit to hold the offices held by him.

Those innuendoes would constitute a serious reflection upon the plaintiff for which he would have been entitled to substantial damages which I would have assessed at Shs. 50,000/-.

Suit dismissed with costs.

For the plaintiff:

AV Clerk

AV Clerk, Kampala

For the defendant:

JA Mackie-Robertson, QC, and PV Phadke

Parekhji & Co, Kampala

White Line Retreads Ltd v The President Valuation Court [1968] 1 EA 517 (HCU)

Division:	High Court of Uganda at Kampala
Date of judgment:	29 May 1968
Case Number:	3/1967 (96/68)
Before:	Dickson J
Sourced by:	LawAfrica

[1] *Rating Law – Appeal – Error of law – Whether failure of valuation court properly to investigate date of receipt of notice of objection with consequent refusal to hear objection as out of time is error of law.*

[2] *Rating Law – Objection – Notice – Whether objection can be heard if lodged out of time – Whether time can be extended or notice waived – Whether notice can be lodged by post – When notice deemed to be lodged if sent by post – Duty of Court to investigate time of receipt properly – Local Government (Rating) Act, ss. 10 and 11 (2) (U.).*

[3] *Rating Law – Procedure – Valuation court – No rules of procedure made under statute – Court bound by rules of natural justice – Local Government (Rating) Act, s. 29 (c) and (e) (U.).*

Editor's Summary

The Town Clerk of the Kampala City Council, in pursuance of the provisions of s. 10 of the Local

Government (Rating) Act, duly issued a notice calling for objections to a draft valuation to be lodged before December 3, 1966. On November 17 the appellant wrote to the clerk of the valuation court, at the Town Clerk's office, objecting to the draft valuation of its plot and asking for the prescribed forms to be supplied to it so that it could lodge notice of its objection. The forms were sent to the appellant on November 22, and the appellant completed them on November 28 and posted them on that same day. The appellant then received a summons, dated December 12, to attend the valuation court on December 14; and a subsequent summons, dated December 14, to attend on December 21. On December 21 the appellant duly attended and a hearing took place. At that hearing the acting Town Clerk maintained that the objection should not be heard because notice of it had been received after December 3, and evidence was given for the Council that the notices had not been received until December 10. The valuation court rejected the appellant's objection as being out of time, refused an application to object out of time, and proceeded to confirm the valuation. From that decision the appellant appealed.

Held –

- (i) no rules having been made under the Local Government (Rating) Act to lay down procedure for the valuation court, that court should be governed by the rules of natural justice (*Local Government Board v. Arlidge* (1) adopted);
- (ii) one of those rules is that parties, if present, should be given an opportunity of being heard;
- (iii) an objection to a valuation cannot be entertained unless it has been lodged within the specified time and the time cannot be extended by the valuation court; nor can the requirement be waived by the local authority (*Re McIntosh* (2) adopted); but
- (iv) in view of the very unusual delay which seemed to have taken place in letters reaching the Town Clerk's office from the appellant, it would have been right for the valuation court to have made further investigation before concluding the case against the appellant; and the court erred in law in failing to decide the issue of whether the notice was received in time.

Appeal allowed. Case remitted to a valuation court.

Cases referred to in judgment:

- (1) *Local Government Board v. Arlidge*, [1915] A.C. 120.
- (2) *Re McIntosh and Pontypridd Improvements Co.* (1891), 61 L.J.Q.B. 164.
- (3) *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* (1888), 40 Ch.D. 100.
- (4) *Kent, Western Division, Godsell v. Innous* (1855), 17 C.B. 295; 139 E.R. 1085.

Judgment

Dickson J: This is an appeal by way of case stated by White Line Retreads Ltd. from a decision of the valuation court confirming the valuation of Shs. 370,000/- in respect of Plot 19, First Street, Kampala.

The burden of the appeal is that the valuation court erred in law by refusing to hear the objections of the appellant, who appeared before it, in pursuance of a summons dated December 21, 1966; and that being so, the valuation of Shs. 370,000/- was arrived at erroneously.

It appears to be common ground that the Kampala City Council (hereinafter referred to as the local authority) complied with the provisions of s. 10 of the Local Government (Rating) Act, by publishing in the "*Gazette*" and in at least one newspaper, a notice calling upon all persons interested to lodge any objections in writing with the Town Clerk, within a specified time not less than twenty-one days from the first publication of such notice, in the form set forth in the schedule to the Act. In pursuance of the aforesaid section, the Town Clerk, by notice issued in the "*Uganda Gazette*" of November 11, 1966, called upon all persons to lodge with him on or before December 3, 1966, any objections in the form specified in the schedule. Such forms were stated to be available at the council offices, Kampala. There is no question that at least a period of twenty-one days was given within which persons wishing to object might do so.

On November 17, 1966, the appellant, through its director, addressed a letter to the clerk of the valuation court, Town Clerk's Office, Kampala, objecting to the valuation of Plot 19, First Street,

Kampala, as stated in the draft valuation roll, and at the same time, requesting him to lodge its objection. In the same letter a further request was made in the following terms” . . . and let us have prescribed forms to lodge notice of objection”. It is observed that by the provisions of s. 11 of the Act, the Town Clerk or some other person appointed by the local authority shall act as clerk to the said court. There is an endorsement on this communication to the effect that three forms were sent to the appellant with a complimentary slip on November 22, 1966. The requisite forms were

completed, signed and dated November 28, 1966. At this juncture, I may observe that the completed form in the file bears the date stamp of the office of the Town Clerk, December 10, 1966, and the earlier letter from the appellant bears a similar date stamp, with the date November 22, 1966. It appears from the documents before me that in accordance with the provisions of s. 11 (2) of the Act two notices were sent to the appellant. Section 11 (2) provides *inter alia* that the court shall, at meetings duly called by the president or clerk, proceed to consider the objections made in accordance with s. 10 of the Act, after having summoned interested parties in the form set out in the schedule, and shall be entitled to make such alterations or amendments in the draft roll. It contains a proviso that no alteration or amendment by way of increase shall be made unless and until the person appearing to be directly affected shall have had at least seven days' previous notice by personal service or registered post.

The two documents to which I have referred are, in fact, summonses. The first is dated December 12, 1966, and among other things states as follows: "Objector seeks to amend to: –", and then follows the sum Shs. 240,000/-. The summons required the appellant to attend the court at 9.15 a.m. on December 14, 1966. It is observed that the appellant was given only two days' notice of the sitting of the valuation court, whereas he was required by statute to receive at least seven days' notice. It is not known whether or not the valuation court sat on December 14. The second summons, in similar terms as the first, is dated December 14 and it requested the appellant to attend on December 21. The court, in fact, sat on that date and it is against the decision of the court made on that day that the appellant has appealed.

At the hearing on December 21, Mr. Heyman, whom I gather from the papers before me, was acting Town Clerk, said, in limine, that it is a late submission by the appellant and he applied for confirmation of the figures. According to the record, Mr. S. P. Okurut, clerk of the court stated as follows:

"I work in the City Council and my duties include receipt of objections from objectors to valuation.

The first letter relating to this plot raising objection to valuation was received by the Council on November 26, 1966. On the same day the objector was sent three forms on a complimentary slip. The objection form was received back on December 10, 1966, and it was stamped with the Council's date stamp."

Mr. Ismail, presumably a director of White Line Retreads Ltd., said:

"I submitted my objection by letter on November 17, 1966, and filled the forms on November 28, 1966. I do not know why they arrived late at the Council. They were posted by my office. I apply to appeal out of time."

Thereupon, the court ruled as follows:

"No satisfactory reason has been given by the objector for late receipt by the Council of the objection. Application to object not allowed."

In para. 10 of the case stated and signed by the president of the court, it is stated *inter alia* that the court being satisfied that the appellant's objection forms were received after December 3, 1966, and that the appellant had no satisfactory explanation to offer, used its discretion and rejected the appellant's application to object as being out of time. It went on to say that the court did not proceed to consider the objection itself and confirmed the council's valuer's assessed value.

It is quite clear that the valuation court refused to hear the appellant because it held the objection was not lodged within the time specified, that is to say,

on or before December 3, 1966. Mr. Jobanputra for the appellant submits that no procedure has been laid down for the valuation court, or for this Court, on the hearing of appeals in these matters. It is clearly so. Section 29 (c) of the Act specifically empowers the Minister to make rules for prescribing the procedure to be adopted in respect of appeals, and by para. (e) of the same section, he is also empowered to make rules prescribing all the matters necessary for the better carrying out of the provisions of the Act. My researches have not brought to light any rules made by the Minister affecting these matters. Counsel for the appellant contends therefore, that the valuation court should be governed by the rules of natural justice, and says it is a basic principle of natural justice that parties, if present, should be given an opportunity of being heard. One does not quarrel with that proposition. See 30 Halsbury's Laws (3rd Edn.), p. 718. The principle is, with respect, aptly stated in the passage of the opinion of Lord Shaw in *Local Government Board v. Arlidge*, [1915] A.C. at p. 138:

"The words 'natural justice' occur in arguments and sometimes in judicial pronouncements in such cases. My Lords, when a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of courts of justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term 'natural justice' means that a result or process should be just, it is a harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous."

As I see it, the rub here is whether the objection was lodged within the time prescribed by statute, that is to say, within a specified time of not less than twenty-one days from the first publication of the notice, in the form set forth in the schedule to the Act. By implication, the local authority is empowered to fix a date, provided it is not less than twenty-one days. In the instant case, notice of objection was required to be lodged on or before December 3, 1966. Section 10 goes on to say that no person shall be entitled to urge any objection before the valuation court, unless he shall have first lodged the notice in the form set out in the schedule. There can be no question that it is clearly expressed that the lodging of a notice is a *sine qua non* to the hearing of an objection by a valuation court. Does the phrase "in the form set out in the schedule hereto" include the specified time? I am inclined to think that on a proper construction of s. 10, an objection cannot be entertained unless it has been lodged within the specified time. There is no express provision for the valuation court to extend the time; nor does it appear to me that it can be waived by the local authority, on the analogy that a local authority, which is authorised to make by-laws, cannot dispense with them in particular cases, the by-laws not being for its benefit, but for that of the public: *Re McIntosh and Pontypridd Improvements Co.* (1891), 61 L.J.Q.B. 164.

The crux of the matter in this case is whether the notice in the form of the schedule was lodged on or before December 3, 1966. It is dated, as we have seen, November 28, 1966.

The appellant's representative told the valuation court that it was posted, and I opine it would be correct to assume that it was posted on the same day. I might as well say here and now, that in my view, a notice may be lodged within the meaning of s. 10 of the Act by posting, subject to this qualification, that the effective date of lodgment being the date it is received by the City Council. As a matter of interest, in England, notices required to be served on valuation officers may be served by posting: 32 Halsbury's Laws (3rd Edn.), p. 99, para. 145; s. 63 (2) Rating and Valuation (Miscellaneous Provisions) Act 1955. As we have seen, s. 11 (2) of the Uganda Local Government (Rating) Act specifically provides for the notice of the date of the sitting of the valuation court to be either by personal service or by registered post. Section 6 of the Interpretation Act (Cap. 16) is almost in similar terms with s. 26 of the English Interpretation Act 1889. By the provisions of s. 6, where any Act of Parliament authorises or requires any document to be served by post, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.

This I must say, it is abundantly clear that the appellant, at a very early stage, i.e. on November 17, 1966, six days after publication in the "*Gazette*", wrote signifying its objection and requested the necessary forms. If the date stamp of the Town Clerk is correct, it took five days to reach his office. A letter posted in Kampala ought not to take that long in reaching the Town Clerk's office in the same city. It is also observed that another letter from the appellant, written on December 15, 1966, to the clerk of the valuation court at the same address, according to the rubber stamp of the office of the Town Clerk, bears the date December 22, 1966: did this letter take seven days to reach that office? It seems to me that the valuation court regarded as conclusive, without further ado, the rubber stamp date of the Town Clerk on the notice of objection, as the date on which that document reached his office. One does not wish to indulge unnecessarily in any form of speculation, but it does appear extraordinary that at least three documents transmitted by the appellant took an inordinate length of time in reaching the office of the Town Clerk, and on the face of it, merits investigation. There was no evidence of the routine in that office of dealing with incoming correspondence, and in these circumstances, it would have been right for the valuation court to have made further investigation before concluding the case against the appellant. It has been submitted that the authorities posted a summons dated December 12, 1966, requesting him to attend the valuation court on December 14, two days after, and therefore the notice sent in by the appellant should have reached the Town Clerk's office two days after November 28. In passing, it is to be observed that the notice dated December 12 was also not in due compliance with s. 11 (2) of the Act, as at least seven days' notice is required.

The valuation court itself, it is clear, did not comply with the provisions of the law, as to the time within which duties imposed on it should be effected, for again the second summons which is dated December 14 and addressed to the appellant at P.O. Box 4232 Kampala, would not have given him at least seven days' notice in view of s. 6 of the Interpretation Act, as also s. 38 thereof (computation of time). The appellant attended the court and may be said to have waived the service of the notice in due time. A provision, like want of due notice for the benefit of an individual, may be waived: *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.* (1888), 40 Ch.D. 100.

The clerk of the valuation court appears to be a dichotomy, performing the duties of the local authority in respect of matter under the Local Government (Rating) Act, which are not strictly related to his duties under that Act, as a clerk

of the court, for apparently he himself dealt with duties of the Town Clerk under s. 10 of the Act; for example the transmission of forms to objectors and his receipt of them when duly filled in. The question arises, if the notice of objection was received after the statutory period, why did he not inform the appellant accordingly? He proceeded to issue summonses (2) for the attendance of the appellant before the valuation court, the relevant part of which reads: "Take note that the valuation court will sit to consider your objection to the valuation roll . . ." It goes on to say that the objection may not be considered if it does not attend. This certainly indicated that his objection will be considered. In *Kent, Western Division, Godsell v. Innous*, Jervis, C.J., said ((1855), 139 E.R. at p. 1087):

"I think this case is precisely in principle like the last. It is unnecessary to consider whether or not it is competent to overseers to waive an objection to the due service of a notice, because the revising barrister has not found that the notice did not come to the hands of the overseers in due time. It was proved that they acted upon the notice: and I apprehend, that, where a public officer acts upon a notice of this sort, it must be assumed, until the contrary is proved, that the notice came to his hands in due time. The decision of the revising barrister must therefore be affirmed."

Mr. Okurut, acting on behalf of the local authority, having received the notice of objection and thereupon issued summons for the attendance of the appellant before the valuation court, can the local authority now say that the notice was not received in due time, until the contrary is proved?

In my opinion, the valuation court should have heard some evidence on the matter when raised by Mr. Heyman, and in a way supported by another official of the local authority, who is also the clerk to the valuation court. If the valuation court erred in failing to decide the issue whether the notice was lodged in time, and which, in my view, it did fail, it erred in law.

The matter must be remitted to a valuation court for due and proper determination as to whether the notice of the appellant was lodged on or before December 3, 1966. If the answer is in the affirmative, the said court will proceed to hear the objections of the appellant.

Order accordingly.

For the appellant:

MV Jobanputra

Jobanputra & Pandya, Kampala

For the respondent:

JB Hira

JB Hira, Advocate, Kampala City Council

Wakiro and another v Committee of Bugisu Co-Operative Union
[1968] 1 EA 523 (HCU)

Division: High Court of Uganda at Kampala

Date of judgment: 28 May 1968

Case Number: 9/1967 (97/68)

Before: Russell J
Sourced by: LawAfrica

[1] Appeal – Co-operative Society arbitration and appeal therefrom – No rules made under Co-operative Societies Act (Cap. 93), s. 69 (2) for time for appeal or procedure thereon – Effect – Whether appeal competent.

[2] Civil Practice and Procedure – Declaratory judgment – When should be granted – Whether arbitrator can grant.

[3] Co-operative Societies – Arbitration – Appeal – Dispute referred to arbitrator by Registrar – Appeal from award of arbitrator to Registrar – Further appeal to High Court – Question of law – Procedure – No rules made regulating time for appealing or procedure on appeal – Appeal lodged within reasonable time – Co-operative Societies Act (Cap. 93), ss. 68, 69 (1) and (2), 78 (U.).

[4] Co-operative Societies – Arbitration – What are disputes touching the business of the Society within Co-operative Societies Act (Cap. 93) (U.).

[5] Master and Servant – Dismissal – Dismissal by payment of salary in lieu of notice – When effective to terminate employment.

Editor's Summary

The appellants were employed by the respondent Co-operative Union under written service agreements which required the appellants to serve the respondent at such places in Uganda or other part of the world as the respondent might from time to time require, and to carry out the reasonable instructions and regulations of the respondent. The agreements also contained a provision by which the employment of the appellants could be terminated by three months' notice or pay in lieu. The agreements were silent about the actual duties to be performed by the appellants; but in fact they were appointed by the respondent to specific offices, the first appellant to that designated "secretary/manager" and the second appellant to that designated "assistant secretary/manager". The respondent decided to reorganise its administrative arrangements, and notified the appellants by letter dated March 29, 1966 that these offices had been abolished with effect from May 1, 1966. They were offered other posts by the respondent which would not have affected their salaries or benefits. The appellants by letter of April 30, 1966, notified the respondent that they regarded this as an abolition of their posts which could not be done without their consent and amounted to a breach of their service agreements; alternatively they contended that they should have been given three months' notice. After further correspondence during which the appellants refused to accept the new posts offered to them by the respondent, the respondent gave the appellants three months' pay in lieu of notice to terminate their services. The appellants referred the dispute to the Registrar of Co-operative Societies, who sent it to arbitration. The arbitrator decided that the appellants had been properly dismissed. The appellants appealed from the arbitrator to the Registrar, who upheld the arbitrator's award. From this decision of the Registrar the appellants brought this appeal to the High Court on questions of law. They conceded that they had been dismissed pursuant to the terms of their service agreements, but they sought a declaratory judgment on various points.

Held –

- (i) the courts will not make a declaratory judgment unless it will serve some effective purpose; and

the same should apply to an arbitrator;

- (ii) although the reasons adduced by the arbitrator for ruling against the appellants were in several instances wrong in law, he was correct in his final conclusions and the appeal should be dismissed.

Observations obiter: (i) as to the meaning of the words “disputes touching the business of the society” in s. 68 of the Co-operative Societies Act;

- (ii) that the services of the appellants were terminated and they ceased to be officers of the respondent instantly they received the letter of dismissal and not three months later.

Appeal dismissed with costs.

Case referred to:

- (1) *Bennett v. Chappel and Another*, [1965] 3 All E.R. 130.

Judgment

Russell J: This is an appeal on questions of law by Messrs. C. M. Wakiro and J. F. Wanda (hereinafter called “the appellants”) who were formerly officers of the Bugisu Co-operative Union Limited (hereinafter called “the society”) pursuant to s. 69 (1) of the Co-operative Societies Act (Cap. 93) (hereinafter called “the Act”) from the decision of the Registrar of Co-operative Societies dated December 23, 1966 on appeal from the award of an arbitrator dated November 7, 1966 to whom the Registrar had referred a dispute notified to him by the said officers in their letter dated May 12, 1966.

Section 68 of the Act provides that if any dispute touching the business of a registered society arises between the society or its committee and any officer of the society such dispute shall be referred to the Registrar for decision. The Registrar on receipt of such reference may either decide the dispute himself or refer it for disposal to an arbitrator. Any party aggrieved by the decision of such arbitrator may within two months of the date of the award appeal to the Registrar and the decision of the Registrar, on appeal or otherwise, is final, subject to a right of appeal to the court. A “court” is defined in s. 2 of the Act in relation to a registered society as meaning the court of a grade I magistrate and in relation to a union of two or more registered societies as meaning the High Court. The instant appeal has been lodged in the High Court as the society is a union of two or more registered societies. Section 69 (2) of the Act enacts that the Chief Justice may make rules of court regulating the procedure and practice of the hearing of such appeals by a court but no such rules have in fact been made. The Co-operative Societies Ordinance (Cap. 210 of the Revised Edition of the Laws of Uganda 1951) which by s. 55 and rr. 27 and 36 specifically prescribed the manner and time for filing an appeal to a subordinate court of the first class and the fees exigible was repealed by the Act and the provisions to which I have referred were not re-enacted in the Act nor do they appear to have been preserved by the saving s. 78.

The present position is therefore, that under s. 69 (1) of the Act, the appellants have a right of appeal to a court on a question of law but no conditions or directions as to the manner or time in which such appeal may be lodged or the court fees payable thereon have been prescribed nor are there any rules of court regulating the procedure and practice for the hearing of such appeals by the court once they have been filed.

As the appeal was filed within a reasonable time from the date of the Registrar’s decision, I was not entitled to deprive the appellants of their statutory right of appeal by reason only of the absence of such

rules and regulations and the hearing of the appeal was conducted on the same lines as an appeal under the Civil Procedure Rules.

Before dealing with the issues of law raised in the memorandum of appeal, it is necessary to mention briefly the facts as far as they are relevant to this appeal.

The appellants were employed by the society on similar written agreements, incomplete copies of which were admitted at the hearing before the arbitrator, and marked exh. P. 13 in the case of Mr. Wakiro and exh. P.30 in the case of Mr. Wanda. Those agreements cancelled all or any previous agreements and provided that the appellants should devote the whole of their time and ability to serving the society at such places in Uganda or other part of the world as the society might from time to time require. The appellants covenanted to abide by and carry out the reasonable instructions and regulations of the society from time to time in force and there was a specific stipulation as to the right of the society to terminate the employment of the appellants in cl. 10(A) (1) reading as follows:

“(A) The union may terminate the employment of the employee:

- (1) By giving the employee one month's or three months' notice in writing or without previous notice by crediting him/her in account in its books with one month's or three months' salary as laid down in cl. 11 below.”

Clause 11 stipulated that in the case of the appellants their salary scale entitled them to three months' notice or pay in lieu of notice.

Although the service agreements are silent as to the specific duties to be performed by the appellants they were in fact appointed to the posts designated secretary/manager and assistant secretary/manager respectively. According to the Co-operative Societies Rules (r. 26 (1)) and the society's bye-laws (bye-law 45, exhibited in the arbitrator's file but not numbered) the society was obliged to appoint a secretary but had discretionary powers to delegate powers of management to a manager or general manager (r. 30 and bye-law 47).

It appears to me obvious that although the committee of the society were not empowered to abolish the office of secretary, they were at liberty to dismiss from their employment the individual who had been appointed to that office or to transfer him to some other post in their organisation. They were also at liberty to enlarge or withdraw from the secretary or a manager any delegated powers of management. The designation “secretary/manager” was therefore merely a convenient method of signifying that the person so designated was not only the secretary but was also exercising managerial powers. The same principles apply to the assistant to the secretary/manager.

By a letter dated March, 29, 1966 (exh. P.10) the committee notified the appellants and others that there had been a re-organisation of administrative arrangements and that (as far as relates to this appeal) the offices of secretary/manager and assistant secretary/manager had been abolished with effect from May 1, 1966. Mr. E. K. Ginadu was to replace Mr. Wakiro as secretary and Mr. Wakiro was to be appointed coffee manager. Later Mr. Wanda was offered a post as the coast representative at Mombasa and Mr. Wakiro was offered the post of general manager. The salaries and benefits of the appellants were not in any way affected.

On April 30, 1966 the appellants and others who were affected by the reorganisation wrote to the society (exh. P.11) that their posts had been abolished and in effect stating that this could not be done without their consent and amounted to a breach of their service agreements. Alternatively they contended they should have been given three months' notice of termination of their services.

By a letter dated May 12, 1966, (exh. P.14) the appellants notified the Registrar of a dispute. In the preamble they accused the members of the committee of having attempted to get rid of them by devious

means in general and in particular by “abolishing their posts” and virtually compelling them to resign. They set out the points of dispute as follows:

- “1. That some members of the committee have on several occasions gone out to societies and to the public at large and made various baseless allegations verbally, by circulars and by other means with the purpose of discrediting some members of the union staff in the eyes of the public, and that this practice has resulted in the present tension and muddle which exists between the committee and the staff concerned; and further that this practice cease forthwith and that the allegations made be withdrawn in writing, as the committee members concerned are responsible for the defamatory damage that has been done to the various members of the union’s management.
2. That the recent decision of the committee adopted in their meeting April 29, 1966, in arbitrarily and unilaterally *abolishing* the posts of secretary/manager, assistant secretary/manager and information secretary with effect from May 1, 1966 is invalid.
3. That the unilateral abolition of the above posts without due notice to the employees concerned is a breach of service contracts entered into by the Bugisu Co-operative Union Ltd. and the several members of staff concerned and therefore unlawful.
4. That the unilateral introduction of a new administrative set-up has lowered the status of the posts of accountant and mill manager/liquorer and is therefore a breach of their service contracts with the union.
5. That the unilateral declaration of the assistant secretary/manager, Mr. Wanda as “redundant” is a breach of service contract entered into between him and the union.
6. That in conducting themselves as indicated above, the committee have not exercised the prudence and diligence of the ordinary men of business by creating a muddle in the administration and management of the business of the union.”

By a letter dated May 18, 1966 (exh. P.17) the society informed Mr. Wakiro that the society had decided to designate him “general manager” with effect from that date but after various meetings and negotiations, he refused to accept the post. The society then by its letter dated July 19, 1966 (exh. P. 26) formally notified him that his employment was terminated forthwith pursuant to the said cl. 10 (A) (1) and paid him his three monthly salary and fringe benefits in lieu of notice.

By a similar letter dated May 26, 1966 (exh. P.39) the society terminated the employment of Mr. Wanda and he also was paid the three months’ salary and fringe benefits. He had refused to accept the post of coast representative.

At the termination of the arbitration proceedings the arbitrator, Mr. B. B. Codda, in a lengthy award dealt with each of the points of dispute in detail and then came to the conclusion that the appellants had been legally dismissed by the society pursuant to their written service agreements and ordered them to pay the costs of the arbitration. The appellants filed a lengthy memorandum of appeal to the Registrar who in an admirably concise and carefully worded decision upheld the conclusion of the arbitrator but set aside the order as to the payment of the costs by the appellants. It is from that decision that the appellants have filed the instant appeal on questions of law.

It has been conceded by Mr. Nabudere that the appellants were in fact dismissed and paid in full pursuant to the terms of their written service agreements. There is and was at the time the arbitrator made his award no question of a claim for wrongful dismissal or damages and all that the appellants could have asked for was some form of declaratory judgment. But as they were no longer officers

or employees of the society a declaratory judgment could not have served any useful purpose even though it may have been some solace to the appellants' injured feelings.

It has been consistently held by the courts (and presumably should be so held by analogy by an arbitrator in settling disputes) that they will not make a declaratory judgment unless it will serve some effective purpose. It is obvious that no useful purpose could have been served by making a declaration as sought by the appellants and no order could be made restraining the committee from making false statements about the appellants in relation to the posts they no longer held: *Bennett v Chappel and Another*, [1965] 3 All E.R. 130. Although the reasons adduced by the arbitrator for ruling against the appellants on all six points of dispute were in several instances wrong in law, he was undoubtedly correct in his final conclusions.

This would be sufficient to dispose of the appeal but as the arbitrator and others do not appear to appreciate correctly the rights of reference under the said s. 68 of disputes to the Registrar, a few comments thereon may not be out of place.

In disposing of the first point of dispute the arbitrator stated:

"I am inclined to believe that the only disputes the Registrar can entertain between an employee and his society are those which involve financial loss which can be determined by reference to the terms and conditions of the service contract or other arrangement between the employee and the society. The plaintiffs did not show that the alleged defamation resulted in any financial loss on their part."

The words "disputes touching on the business of the society" have not been defined in the Act nor in the comparative ss. 68 in The Friendly Societies Act 1896, 49 in the Industrial and Provident Societies Act 1893, in England, or the Co-operative Societies Act 1912, in India. It appears, however, to be generally accepted that even though the words must be strictly construed as s. 68 of the Act ousts the jurisdiction of the courts the word "disputes" includes all matters which could form the subject of civil litigation and "touching the business of the society" is not confined to disputes regarding the internal management of the affairs of the society or disputes in regard to the principles which would regulate the conduct of business. It would include for example a dispute as to whether the election of certain persons as members of the committee was legal but it would not include purely personal claims such as a claim for defamation of character by an officer against the committee. The arbitrator does not appear to have been justified in restricting the words to disputes involving financial loss although he would have been justified in confining them to disputes involving legal loss or liability.

In disposing of the sixth point of dispute the arbitrator stated:

"Secondly, as long as the terminations of services were effected under cl. 10 (A) (1) of the service agreement referred to above, the employees were entitled to three months' notice during which time they would, in my opinion, continue to be union officers. This privilege would, in my opinion not be invalidated by the fact that three months' pay was given in lieu of such notice – the employees continued to have the privileges of union officers for three months beyond the date of termination of service, and could in my opinion sue the committee during that time."

It is clear that the appellants' employment was terminated the moment they received the letters of dismissal and they then ceased to be officers of the Society or have any rights as such to refer any disputes to the Registrar pursuant to s. 68 of the act. It would have been otherwise if they had been given three months'

prior notice of termination, as they would, in such event, have continued to be officers of the society until the period of the notices had expired.

For the above mentioned reasons the appeal is dismissed. At the time when the Registrar recorded his decision he was obviously not entitled to make a declaratory ruling or issue a mandatory injunction in relation to matters which had ceased to have any practical importance and he rightly dealt with the appeal on the basis that the appellants' only subsisting complaint was that they had been wrongly dismissed by the society. The appellants have persisted in appealing despite the eminently sound decision of the Registrar and I can see no reason why I should depart from the normal rule of awarding the costs of the appeal to the successful party. The appellants will therefore have to pay the respondent's costs of this appeal.

Appeal dismissed.

For the appellants:

DW Nabudere

DW Nabudere, Mbale

For the respondent:

GK Patel

GK Patel, Mbale

Sirley v Tanganyika Tegry Plastics Ltd [1968] 1 EA 529 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	3 July 1968
Case Number:	14/1968 (100/68)
Before:	Sir Charles Newbold P, Sir Clement De Lestang V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Saidi, J

[1] *Advocate – Clients' account – Advocate paying cheque on clients' account as consideration for endorsing promissory note – Advocate alleging money was his own money but declining challenge to produce proof of this – Whether Court entitled to hold advocate not holder of note in due course – Whether advocate is beneficial owner of clients' money.*

[2] *Bill of Exchange – Promissory note – Holder in due course – Presumption that holder gave value – Rebutted by evidence that holder, an advocate, paid consideration by cheque on "clients' account" –*

Advocate alleging money was his own money but declining challenge to produce proof of this – Who is holder in due course.

[3] Bill of Exchange – Promissory note – Total failure of consideration – Whether defence to claim on note by holder.

[4] Bill of Exchange – Promissory note – Wording – Reference in promissory note to invoice in consideration of which note given – Whether objectionable – Bills of Exchange Ordinance (Cap. 215), s. 84 (1).

[5] Civil Practice and Procedure – Amendment of pleading – Complaint – Name of plaintiff objected to and amended at last moment – What order for costs should be made – Civil Procedure Code 1966, O. I, r. 10 (1) (T.).

[6] Costs – Amendment of complaint – Technical amendment to cure defect in name of plaintiff – What order for costs should be made.

Editor's Summary

The appellant was an advocate and had been engaged in the formation of a company called Polypen Ltd. on behalf of a client. He subscribed Polypen, Ltd.'s memorandum and articles, was an alternate director for some time, and held two shares as a nominee. The respondents ordered goods from Polypen, Ltd., for delivery by the end of October, 1966. Polypen, Ltd. delivered to the respondents a pro forma invoice dated October 3, 1966 for Shs. 23,485/-, in payment of which the respondents made and delivered to Polypen, Ltd. a promissory note dated October 4, 1966 payable after sixty days. A reference to this pro forma invoice appeared after the words "for value received" on the face of the note. The intention was that Polypen, Ltd. would discount the note and use the proceeds to clear the goods from the Customs. An unsuccessful attempt was apparently made to discount the note through a bank and a deleted endorsement to the bank appeared on the note. The appellant then discounted the note and it was endorsed "Pay to B. Sirley & Co." (the firm of which the appellant was the sole proprietor). The appellant gave to Polypen, Ltd. a cash cheque for Shs. 18,000/- (the difference between that amount and the face value of the note being professional fees owed and discounting charges). This cash cheque was drawn on the appellant's "clients' account". In the event, Polypen, Ltd. failed to deliver the goods to the respondents, and when the note was presented for payment to the respondents by the appellant on December 6, the respondents refused to honour it. When sued on the note, the respondents maintained that Polypen, Ltd.'s breach of contract had resulted in a total failure of consideration, and that the appellant was not a holder in due course.

of the note. At the trial it was alleged that the appellant had used clients' money, not his own money, to discount the note; and the appellant failed to produce his ledger when called upon to do so in order to prove that he had in fact used his own money. The trial judge held that the appellant was not a holder in due course of the note and dismissed the appellant's claim. The appellant sued as "B. Sirley & Co." but at the trial had to apply to amend this to "B. Sirley practising as B. Sirley & Co.". This application the judge only allowed on terms that the appellant should pay all the costs up to the date of the amendment. The appellant appealed.

Held –

- (i) a total failure of consideration for a note is a defence against a claim on a note made by an immediate party, but is not a defence against a holder in due course, i.e., a person who took the note in good faith and for value and who at the time the note was negotiated to him had no notice of any defect in the title of the person who negotiated it;
- (ii) if in fact the appellant used clients' money to discount the note he did not give value for it;
- (iii) the addition of the reference to the invoice after the words "for value received" on the note was unusual but unobjectionable so long as it was not intended to impose a condition; but, when coupled with the deleted endorsement from the bank and the appellant's close connection with the drawer, it was not unreasonable for the trial judge to have implied that the appellant was put on enquiry;
- (iv) the trial judge was justified in drawing an adverse inference from the appellant's conduct in refusing the challenge to produce his ledger to prove that he used his own, not clients', money to discount the note;
- (v) the fact that the cheque relied on by the appellant as establishing his title to the note was drawn on "clients' account" *prima facie* rebutted the presumption in his favour that he was the holder for value; and the trial judge was right to decide the case on a balance of probabilities;
- (vi) (obiter) the technical amendment to the name of the plaintiff should have been allowed without any order for costs against the appellant.

Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Robinson v. Reynolds* (1841), 2 Q.B. 196; 114 E.R. 76.
- (2) *Nanlal Vrajdas v. Chunilal Dhanji Mehta* (1946), 13 E.A.C.A. 58.
- (3) *A. N. Phakey v. Worldwide Agencies, Ltd.* (1948), 15 E.A.C.A. 1.
- (4) *George & Co. v. Pritam's Auto Service* (1955), 22 E.A.C.A. 233.

July 3, 1968. The following considered judgments were read:

Judgment

Law JA: The appellant, a Nairobi advocate, who is licensed to practice both in Kenya and Tanzania, was the plaintiff in a civil suit filed in the High Court of Tanzania in which the respondents, a limited

liability company carrying on business in Dar-es-Salaam, were defendants. The plaint, which was issued under the summary procedure prescribed by O. 35 of the Civil Procedure Code of Tanzania for, *inter alia*, suits upon bills of exchange and promissory notes, claimed the sum of Shs. 23,485/- allegedly due to the appellant as holder in due course of a promissory note made by the respondents in favour of a Nairobi company known as Polypen, Limited. The respondents obtained unconditional leave to defend the suit and in due course filed a defence stating that they were not liable on the note as it had been made for a consideration which had wholly failed, and that the appellant had become the holder of the

note without consideration, alternatively with notice of a defect in the title of the drawee, that is to say with notice of the total failure of consideration aforesaid. The note was issued in the following circumstances: the respondents ordered, and Polypen, Ltd. undertook to supply, 3,355 gross ball-pen refills by the end of the October, 1966, and Polypen Ltd. delivered to the respondents a pro forma invoice dated October 3 for Shs. 23,485/- for the price of these refills. In payment of the invoice the respondents made and delivered to Polypen, Ltd. a promissory note, dated October 4, engaging them to pay the said sum of Shs. 23,485/- after sixty days. It is common ground that the note was made before delivery of the goods so that Polypen, Ltd. could discount the note and use the proceeds to clear the goods from the Customs, and it is also common ground that Polypen, Ltd. failed to deliver the goods in accordance with its contractual obligation, and that the respondents refused to honour the note when it was presented for payment by the appellant on December 6. Polypen, Ltd.'s breach of its contractual obligation to deliver the refills resulted in a total failure of the consideration for which the promissory note had been given. Such a total failure of consideration is a defence against a claim on the note made by an immediate party (see for instance *Robinson v. Reynolds* (1841), 114 E.R. 76), but is not a defence against a remote party who is a holder in due course, that is to say a person who took the note in good faith and for value, and who at the time the note was negotiated to him had no notice of any defect in the title of the person who negotiated it. The whole question in this appeal is whether the appellant was, in the circumstances of this case, such a holder in due course.

Apparently Polypen, Ltd. intended to discount the note through a bank, as is normal, and it endorsed the note with a rubber stamp to this effect; "Pay to the order of the Bank of Baroda"; but the inference from an amendment to that endorsement is that the bank for some reason did not discount the note. The endorsement was then deleted and the following endorsement substituted in manuscript: "Pay to B. Sirley & Co." and accepted for and on behalf of B. Sirley & Co. The suit was filed in the name of "B. Sirley & Co." as plaintiff. The appellant is the sole proprietor of the firm of B. Sirley & Co., and when the trial opened a preliminary objection was successfully taken by the respondents that the appellant was not entitled to sue in his business name, as an individual carrying on business in a name or style other than his own, and the court allowed an application made on behalf of the appellant for the title of the plaintiff in the suit to be altered from "B. Sirley & Co." to "B. Sirley, practising as B. Sirley & Co.", upon the terms that the appellant should pay all costs incurred up to date of the amendment. I shall deal with this matter at a later stage in this judgment.

After some argument as to who was to open, the appellant agreed to do so thus relieving the learned judge of the necessity for ruling which party should open, and the appellant gave evidence in support of his case. He deposed that he was the legal adviser of Polypen, Ltd., that he had formed the company on the instructions of a Swiss company in 1963, that he appeared as a subscriber in the memorandum and articles of association, that he held two shares in Polypen, Ltd. as a nominee for the Swiss company, and that he had been an alternate director of Polypen, Ltd. until the middle of 1965. He said that the promissory note was endorsed to him by Polypen, Ltd. on October 10 or 12, as that company urgently required cash to release the goods from the Customs, and that after making inquiries about the financial standing of the respondents, he agreed to discount the note and accordingly, on October 22, he gave Polypen, Ltd. a cash cheque for Shs. 18,000/- representing Shs. 23,485/- less 3 per cent discount commission and some Shs. 5,000/- which he was owed by Polypen, Ltd. for professional fees. The appellant produced this cheque for Shs. 18,000/-,

and it appeared from the face of it that the cheque was drawn on the appellant's clients' account. If in fact the appellant used clients' money to discount the note, it is clear that he did not give value for it, because although a solicitor is, as trustee, the legal owner of clients' money lying with him, he is not the beneficial owner, and he could not use clients' money to discount a note except with the authority of the client.

Mr. Balsara, who appeared for the respondents at the trial, suggested in cross-examination that the appellant had used Polypen, Ltd.'s own money to discount the note. The appellant denied this, and said he had paid Shs. 18,000/- of his own money into his clients' account to cover the cheque and that this transaction was reflected in his ledger. Mr. Balsara made it quite clear that he did not accept this explanation, and asked to see the ledger. He pointed out that he had served notice on the appellant to produce all books, papers and letters relating to the matters in question between the parties. The appellant explained that he had not brought the ledger, which was bulky, and which related to the affairs of many other clients so that it could not conveniently be spared from his office in Nairobi. Mr. Balsara insisted on being allowed to inspect the ledger, but Mr. Kanji for the appellant made it clear that the ledger would not be produced, and he did not ask for an adjournment to enable it to be produced. I will deal in more detail with this aspect of the case at a later stage in this judgment.

The learned trial judge gave judgment for the respondents, for reasons which he summarised in the final paragraph of his judgment as follows:

"Having given the most serious consideration to the cases put forward by each side and having regard to the facts that the plaintiff being so closely connected with the affairs of Polypen, Ltd. as the founder, a shareholder, a director for a considerable time, and its advocate; that the promissory note appears to be a doubtful one by reason of the words 'Pro forma invoice of 3.10.66. for 3,355 gross refills' immediately after the words 'for value received', that the cheque . . . for Shs. 18,000/- given to Polypen, Ltd. by the plaintiff for discounting the promissory note was a cash cheque drawn on the plaintiff's clients' account and not on his personal account; and that the plaintiff was unwilling to produce his books of account to the Court for inspection, when he had been given notice to do so, I find there is a preponderance of evidence in favour of the defendants. Viewing the evidence as a whole, I am not satisfied that the plaintiff is a holder in due course for value without notice of the defect in the title of Polypen, Ltd. in the promissory note so as to entitle him to payment under the promissory note. In the result the plaintiff's case is dismissed with costs."

This passage from the judgment has been strongly attacked by Mr. Kanji, for the appellant, in his argument in support of the two main grounds of appeal, which are that the learned judge erred in holding that the appellant did not give any value for the promissory note, and that he had notice of the defect in the title of Polypen, Ltd. to the note. I will deal with these grounds of criticism in the order in which they are set out in the judgment. Mr. Kanji submitted that in coming to the conclusion that the appellant was closely connected with the affairs of Polypen, Ltd., the learned judge misdirected himself in saying that the appellant was the founder of Polypen, Ltd., that he had been a director for a considerable time and that he was a shareholder. The appellant was not the founder of Polypen, Ltd., but the advocate who formed the company on the instructions of the founder. The learned judge was under no misapprehension as to this, and had set out the correct position earlier in his judgment. The appellant had been an alternate director for the first two years of the company's life, and was a shareholder only as a nominee. These matters were also correctly set out earlier in the judgment, and in referring to the appellant as a shareholder

and director for a considerable time, I do not consider that the learned judge misdirected himself. I have had some difficulty in understanding what the learned judge meant when he described the promissory note as “doubtful”. It is not usual to describe on a promissory note the consideration for which it has been given, but I can see no objection to the addition after the words “for value received” of a reference to the pro forma invoice in consideration of which the note was made. It was never suggested by either party that this reference was intended to impose a condition, in which case the document in question would not have been a promissory note at all, having regard to the definition of a promissory note in s. 84 of the Bills of Exchange Ordinance (Cap. 215) as being an unconditional promise in writing. I think that when the learned judge used the word “doubtful” he meant no more than “unusual”. It may be that in using the word “doubtful” the learned judge meant that the reference to the pro forma invoice was such as to put the appellant on inquiry as to whether Polypen, Ltd. had supplied or intended to supply the goods in accordance with the invoice. As the learned author of *Chalmers on Bills of Exchange* (13th Edn.) says, at p. 94 “if the bill itself conveys a warning, caveat emptor”. If the learned judge was implying that the appellant, a solicitor, who was being asked to discount a note on behalf of a client company with which he personally had a close connection, should have made inquiry as to whether value had been given in accordance with the invoice referred to on the face of the note, then I do not consider this to have been an unreasonable comment on the part of the learned judge, especially as the inference from the amended endorsement on the back of the note is that a bank had refused to accept it. No explanation as to this aspect of the case was given by the appellant. As regards the fact that the appellant’s cheque which he gave when discounting the note was a cash cheque drawn on his clients’ account, and that he was unwilling to produce his books of account, Mr. Kanji submitted that the learned judge should have accepted the appellant’s explanation that he first paid the necessary money into the account from his own funds, and that it was unreasonable to expect him to bring a bulky ledger from Nairobi to Dar-es-Salaam, although he had been served with notice to produce all relevant books. Mr. Kanji submitted that it was wrong to draw an adverse inference, as the learned judge undoubtedly did, from the appellant’s failure to produce his ledger. The position as I see it is that Mr. Balsara clearly and unequivocally suggested that the appellant had used clients’ money, possibly even Polypen, Ltd.’s own money, in discounting the note and equally clearly Mr. Balsara had challenged the truth of the appellant’s explanation that he had put his client’s account in funds with his own money, and that this transaction was reflected in his ledger. These suggestions by Mr. Balsara amounted to imputations of professional misconduct against the appellant, and although the appellant’s explanation for not producing his ledger and for his refusal to ask for an opportunity to do so might have been acceptable in the case of an ordinary litigant, the appellant is not an ordinary litigant. He is an advocate and an officer of the court, against whom allegations of professional misconduct had been made in open court. I find it difficult to understand how, in these circumstances, he did not insist on being given an opportunity of disproving these allegations, although this might have caused him inconvenience and expense. He was actually challenged to produce his ledger, but refused the challenge. Having regard to the appellant’s special position, I consider that the learned judge was fully justified in drawing an adverse inference from the appellant’s conduct. Let it be clearly understood that I am not for a moment suggesting that Mr. Balsara’s allegations represented the truth. But the fact remains that these allegations were made, and however unjustified they may have been I consider that it was for the appellant to do all in his power, having regard to his special position, to show that they were untrue. This he chose not to do, and he must take the consequences.

The most substantial argument put forward by Mr. Kanji was, in my opinion, that the learned judge was wrong in deciding the case on a balance of probabilities, having regard to the presumption in the appellant's favour which is stated in the following words in s. 30 (1) of the Bills of Exchange Ordinance:

"Every party whose name appears on a bill is *prima facie* deemed to have become a party thereto for value."

Mr. Kanji submitted that nowhere in his judgment did the learned judge hold that this presumption had been rebutted, so as to cast on the appellant the burden of proving that he was a party to the note for value. Reading the judgment as a whole, however, it is quite clear in my opinion that when the cheque given by the appellant to Polypen, Ltd. for discounting its note was produced, and when it appeared on the face of that cheque that the money represented by that cheque did not belong beneficially to the appellant, the learned judge considered the presumption in favour of the appellant to have been rebutted. The learned judge referred to the presumption raised by s. 30 (1) of the Bills of Exchange Ordinance and to the fact that the onus of rebutting this presumption was on the defence. The fact that he found in favour of the defence necessarily implies, in my view, that he considered the presumption to have been rebutted. In my opinion the fact that the cheque relied on by the appellant as establishing his title to the note was drawn on "clients' account" *prima facie* rebutted the presumption in his favour that he was the holder thereof for value. Had notice to produce all relevant documents not been given, the appellant would not have had to produce this cheque, he could have relied on the note and on the presumption in his favour. Once the cheque was produced, however, it became evidence in the suit which on the face of it rebutted the presumption that value had been given. In these circumstances, the learned judge correctly decided the case on a balance of probabilities, see *Nanlal Vrajdas v. Chunilal Dhanji Mehta* (1946), 13 E.A.C.A. 58, and as he found that the preponderance of evidence favoured the defence, and has not been shown to have misdirected himself on the law or on the facts in so finding, I consider that this appeal should be dismissed, and I would so order, with costs to the respondents.

As the appeal in my view fails, it is not strictly necessary to deal with ground 8, which complained that the learned judge erred in awarding to the respondent all the costs up to the date of the amendment when he allowed the appellants application to amend the title of the plaintiff. This was a technical amendment to cure a misdescription in the title of one of the parties which had not caused any prejudice to the respondents, and I doubt if such a drastic order as that made was justified. It is true that Mr. Kanji is recorded as having asked that the amendment be allowed "upon paying costs up to date". This might have been the appropriate order had the effect of the amendment amounted to creating a new plaintiff. The respondents were under no misapprehension as to the identity of the true plaintiff, and took objection to his description in the title of the plaintiff at the last possible moment. The name of the plaintiff forms an integral part of the plaintiff, and had the objection been taken in the defence the plaintiff would have been entitled, without leave, to make the necessary amendment (*A. N. Phakey v. Worldwide Agencies, Ltd.* (1948), 15 E.A.C.A. 1), and see also *George & Co. v. Pritam's Auto Service* (1955), 22 E.A.C.A. 233. The amendment in this case did not in fact involve the respondent in any expense and I consider it should have been allowed without any order as to costs being made against the appellant.

Sir Charles Newbold P: I have had the advantage of reading in draft the judgment of Law, J.A., and I agree with it. There will be an order in the terms proposed by him.

Sir Clement De Lestang V-P: I agree.

Appeal dismissed.

For the appellant:

SHM Kanji

Fraser Murray, Roden & Co, Dar-es-Salaam

For the respondent:

Velji

Sayani, Balsara & Velji, Dar-es-Salaam.

East African Navigators Ltd v Mohanlal Mathuradas & Bros
[1968] 1 EA 535 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	3 July 1968
Case Number:	3/1968 (102/68)
Before:	Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Tanzania – Georges, CJ

[1] *Carriage by Sea – Shippers – Whether Shipper can sue for loss of goods in which he has no proprietary interest.*

[2] *Damages – Breach of contract – Loss of goods by carrier – Observations on who can recover damages and how much.*

[3] *Sale of Goods – Risk and property – When risk passes – Sellers sending goods to buyer by sea – Seller paying freight and insuring goods.*

Editor's Summary

The Rufiji Co-operative Society ordered goods from the respondents, a firm of general merchants in Dar-es-Salaam. There had been similar dealings between these parties before and the usual practice was that the Society would only pay for goods on delivery. The respondents delivered the goods to the appellants for transportation by sea to Ndundu, on the terms of a document issued by the appellants to the respondents. The respondents insured the goods and paid the freight, adding the cost of transport to the price of the goods. The goods were lost on the way owing to the negligence of the appellants. The respondents themselves sued the appellants for the value of the goods. At the trial one issue raised was

whether the respondents had any right to sue. The Chief Justice held on this point that the relationship between the respondents and the Society was that of seller and purchaser and that the property in the goods passed to the Society at the latest when they were shipped; but that this was immaterial because the respondents entered into the contract of carriage with the appellants as principals and not as agents for the Society, and that the respondents could therefore sue on the contract.

Held –

- (i) where there is a special contract between the shipper and the carrier the question of an inference of agency does not arise (*Cork Distilleries Co.* case (1) distinguished);
- (ii) there was such a contract here between the respondents and the appellants upon which the respondents could sue, even though the property in the goods had passed to the buyer;
- (iii) (by de Lestang, V.-P., obiter) although the property passed to the Society as consignee the risk pending delivery of the goods remained with the respondents; but this did not give the respondents a proprietary interest in the goods entitling them to sue in contract (though it probably would suffice to support a cause of action in tort);

- (iv) (by Newbold, P., obiter) it did not necessarily follow that, because the respondents could sue, they would recover the full value of the goods.

Observations by Newbold, P. on recovery of damages for breach of contract. Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Cork Distilleries Co. v. Great Southern and Western Railway Co.* (1874), L.R. 7 H.L. 269, H.L.
- (2) *Kampala General Agency v. Mody's (E.A.), Ltd.*, [1963] E.A. 549.
- (3) *Dunlop v. Lambert* (1839), 6 Cl. & Fin. 600; 7 E.R. 824.
- (4) *Davis v. James* (1770), 5 Burr. 2680; 98 E.R. 407.
- (5) *Joseph v. Knox* (1813), 3 Camp. 320, N.P.; 170 E.R. 1397.
- (6) *Houlder Brothers & Co., Ltd. v. Public Works Commissioner*, [1908] A.C. 276.
- (7) *Dawes v. Peck* (1799), 8 Term Rep. 330; 101 E.R. 1417.
- (8) *Calcutta Steam Navigation Co., Ltd. v. de Mattos* (1863), 32 L.J.Q.B. 322.
- (9) *Gardano v. Greek Petroleum Co., Ltd.*, [1961] 3 All E.R. 919.

[**Editorial Note:** The judgment of the Chief Justice in the Court below is reported at [1968] E.A. 186.]

July 3, 1968. The following considered judgments were read:

Judgment

Sir Clement De Lestang V-P: The relevant facts giving rise to this appeal may be set out shortly. The Rufiji Co-operative Society (hereinafter called the Society), ordered some goods from the respondents, a firm of general merchants in Dar-es-Salaam. The Society had made similar orders in the past and the goods so ordered had been supplied by the respondents and shipped by them to the Society. The practice was for the Society to pay for the goods on receiving them at their destination and for the respondents to add the cost of transport to their bill.

In the present case, the respondents obtained either from their stocks or by purchase elsewhere, the goods required, and delivered them to the appellants for transportation by sea to a named place. On receipt of the goods the appellants issued to the respondents a document, the relevant portion of which, after describing the appellants as being "Coastal Freight Carriers" and stating the name of the ship, read:

"Received from Mohanlal Mathuradas & Brothers (the respondents) for carriage from Dar to Ndundu. Subject to the terms and conditions of the Carriage by Sea Ordinance No. 6 of 1927."

Then follows a description of the goods and the transport charges therefor. At the bottom of the document are to be found four stipulations, followed by the captain's signature. This document does not specify to whom the goods were to be delivered at the end of the carriage but it is clear from the evidence that the appellants knew that they were intended for the Society whose president was present when the arrangements for transportation were made prior to shipment. Unfortunately the goods failed to reach their destination, the ship having run aground and the goods having been lost owing to the negligence of

the appellants. That being so, the protection afforded to carriers by sea by the provisions of the Carriage by Sea Ordinance of 1927 did not avail the appellants and the learned Chief Justice so held.

The respondents brought a suit against the appellants for the value of the goods founding their claim on an alleged breach of the contract of carriage,

namely to carry the goods safely to their destination. Among the many issues raised at the trial, one concerned the right of the respondents to sue the appellants at all and this is the only issue with which this appeal is concerned. There is really no dispute as to the law applicable to this case which, as I have already indicated, is founded on a breach of contract of carriage. It is succinctly stated in *Scrutton on Charter Parties and Bills of Lading* (17th Edn.), p. 250, thus:

“B. *In contract*, there can sue:

- (1) The shipper, unless he acted merely as agent for another, in which case the principal can sue and the agent cannot, except where he makes a special contract in his own name with the shipowner.
- (2) Any person to whom by indorsement and delivery of the bill of lading, or by indorsement followed by delivery of the goods, the absolute property in the goods has passed.
- (3) The consignee named in the bill of lading if the property has passed to him by such consignment.”

The learned Chief Justice found that the relationship between the respondents and the Society was that not of principal and agent but of seller and purchaser and that the property in the goods passed to the Society at the latest when they were shipped by the respondents, that nevertheless the respondents did not enter into the contract of carriage with the appellants as agents of the Society but in their own name as principals and that consequently they had a right to sue. The learned Chief Justice did not deal extensively with this aspect of the case but said this by way of conclusion:

“I would hold that the property had passed, but in the circumstances of this case, this would be immaterial, as a special contract had been entered with the shippers, as evidenced by the receipt, P.3. That contract was not entered into with them as agents for anyone, but with themselves as principals, and for breach of the contract they can sue.”

It is against this latter finding that the appellants appealed and there is no cross-appeal.

Relying on *Cork Distilleries Co. v. Great Southern and Western Railway Co.* (1874), L.R. 7 App. Cas. 269, Mr. Lakha, for the appellants, contends that in the absence of special circumstances the proper inference to be drawn from the facts which I have outlined is that the respondents were acting as agents of the appellants in shipping the goods and had no proprietary interest in them. From there he argued that they had no right to sue.

The question for decision in the *Cork Distilleries Co.* case was whether, where goods are delivered by a vendor to a carrier to be carried to a certain place for a named consignee, such consignee may demand them of the carrier at another place. This question was submitted by the House of Lords to the judges and in expressing their opinion in the affirmative, Mellor, J. said (L.R. 7 App. Cas. at p. 277):

“There is evidence in the present case that these goods were, with the consent or by the authority of the purchaser, consigned by the vendors, as consignors, to be carried by the defendants as common carriers, to be delivered to the purchaser as consignee, and that the name of the consignee was made known to the defendants at the time of the delivery. Under such circumstances the ordinary inference is that the contract of carriage is between the carrier and the consignee, the consignor being the agent for the consignee to make it.

It appears to us that there is evidence also that at the time of the delivery there was a specific mention that the freight was to be paid by the consignee. Under such circumstances the inference is almost irresistible that the contract for carriage in the present case was the ordinary contract for carriage at the cost and risk and under the control of the consignee.

We are far from saying that, under other evidence of facts, a special contract might not be inferred between the carrier and the consignor.”

The decision of the judges was confirmed by the House. This case was also applied in *Kampala General Agency v. Mody's (E.A.), Ltd.*, [1963] E.A. 549.

It is clear, however, that the inference of agency which is usually made in the circumstances disclosed by the *Cork Distilleries Company's* case (*supra*), does not apply where there is a special contract between the shipper and the carrier. As Lord Cottenham, L.C. said in *Dunlop v. Lambert* (7 E.R. at p. 834):

“I am of opinion that although, generally speaking, where there is a delivery to a carrier to deliver to a consignee, he is the proper person to bring the action against the carrier, should the goods be lost; yet that if the consignor made a special contract with the carrier, and the carrier agreed to take the goods for him, and to deliver them to any particular person at any particular place, the special contract supersedes the necessity of showing ownership in the goods; and that, by the authority of the cases of *Davis v. James* (1770), 98 E.R. 407 and *Joseph v. Knox* (1813), 170 E.R. 1397, the consignor, the person making the contract with the carrier, may maintain the action, though the goods may be the goods of the consignee.”

In the present case, the learned Chief Justice held that the contract was between the respondents and the appellants and that it was to the respondents that the appellants would have turned for their money had there been any difficulty about payment of the freight. With this finding I am in respectful agreement. The document which I have already referred to constituted the contract of carriage which is expressed to be made between the appellants and the respondents. It does not show on its face that the goods were intended for the Rufiji Co-operative Society although it is clear from the evidence that they were to be delivered to them. It is also clear from the evidence of the appellants that the freight would be paid not by the Society but by the respondents.

This would be sufficient to dispose of this appeal, but it was further contended by Mr. Peera, for the respondents, that even if the respondents were the agents of the Society in regard to the contract of carriage, they had some proprietary interest in the goods by reason of the fact that payment for them was to be made only on receipt of the goods by the Society. The learned Chief Justice, as I have already mentioned, held that the property in the goods passed to the Society at the latest at the time of shipment. Section 22 of the Sale of Goods Ordinance (Cap. 214 of the Laws of Tanzania), provides that:

“Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not . . .”

So although the general rule is that the risk attaches to the ownership of the goods the parties may, by agreement, evince a different intention and such an agreement may be inferred from the course of dealing between the seller and the purchaser. As Lord Cottenham, L.C. said in *Dunlop's* case (7 E.R. at p. 832):

“If a particular contract be proved between the consignor and the consignee, – and the circumstances of the payment of the freight and insurance

is not alone a conclusive evidence of ownership, – as where the party undertaking to consign, undertakes to deliver at a particular place, the property, till it reaches that place and is delivered according to the terms of the contract, is at the risk of the consignor.”

Also, in *Houlder Brothers & Co., Ltd. v. Public Works Commissioner*, their Lordships of the Judicial Committee said ([1908] A.C. at p. 290):

“The fact that one-third of the price is not to be paid till the cargo has been delivered, though according to the authorities it does not prevent the property in the goods from vesting in the consignee, yet gives the consignor a direct interest in the safe carriage and delivery of the goods, and so far differentiates this contract from a normal contract.”

A fortiori where the whole price was to be paid after delivery.

It is known in the present case that the course of dealing between the respondents and the Society was that the goods would not be paid for until they had actually been delivered to the Society. There is also uncontradicted evidence that the respondents insured the goods, presumably for their own benefit, since the insurance company met their claim. From these matters the conclusion is, in my view, irresistible that although the property passed to the Society the risk pending delivery at destination remained in the respondents. I do not, however, accept that this risk gave them a proprietary interest in the goods, entitling them to sue the appellants in contract, although it would probably suffice to support a cause of action in tort which does not arise here. My purpose in dealing with this argument of the respondents is that to me it seems to lend much support to the learned Chief Justice’s finding that the contract with the appellant – the carriers – was a personal one between them entitling the appellants to sue for breach of contract.

I would accordingly dismiss this appeal with costs.

Sir Charles Newbold P: The facts relating to this appeal are set out in the judgment of Sir Clement de Lestang, V.-P., which I have had the advantage of reading in draft. I agree with his conclusion that the appeal should be dismissed, but for two reasons I should like to do so in my own words.

The first is that I have received the impression from the judgment of the Chief Justice that he regards the statements made in *Scrutton on Charter Parties and Bills of Lading* and *Carver’s Carriage of Goods by Sea* rather as if they were legislation determining the rights of the parties subject to “interpretation” instead of regarding them, as he should do, as statements of opinion by the authors, or the editors, of those text books, which opinion may or may not be correct.

The second is that while the issue on the appeal is solely the question of whether the respondents, as sellers and consignors of certain goods, could sue the carriers in respect of the loss of those goods, the fact that the respondents could do so does not mean, as appears to have been assumed generally, that the respondents are thereby entitled to recover the full amount of the value of the goods, irrespective of the damage which the respondents actually suffered from the loss of the goods.

Where a seller consigns goods to a buyer by a carrier, the law governing the relationship of the seller with the carrier is as follows. A seller who, at the request of the buyer, consigns goods to a buyer normally in so doing acts as the agent of the buyer. (See s. 34 of the Sale of Goods Ordinance (Cap. 214).) In the absence of a special contract, or circumstances from which a special contract can be inferred, the seller cannot sue the carrier in respect of the loss of the goods. (See *Cork Distilleries Co. v. Great Southern and Western Railway Co.* (1874), L.R. 7. H.L. 269, H.L.; *Kampala General Agency v. Mody’s (E.A.)*,

Ltd., [1963] E.A. 549; and *Dawes v. Peck* (1799), 101 E.R. 1417.) But a seller may make a special contract with a carrier and in such a case the carrier may be liable to the seller for damage arising from the loss of the goods and the seller may sue the carrier for such damage, even if the property in the goods has passed to the buyer. (See *Dunlop v. Lambert* (1839), 7 E.R. 824.)

The cases have made this right of the seller to sue the carrier dependent upon the existence of what is called a special contract, but it has not always been clear precisely what those words mean. The position, however, is simple. It is that the seller, in consigning, normally acts purely and simply as the agent of the buyer and therefore there is no contract between the seller, as consignor, and the carrier. As there is no contract between them there is no right in the seller to sue the carrier for breach of contract. For the seller to have any right of action in contract against the carrier either the seller, as consignor, must enter into the contract of carriage as a principal or, if he enters into the main contract of carriage as an agent for the buyer, there must also be a subsidiary contract, or circumstances from which a subsidiary contract can be inferred, to which he is a party as principal. Thus, if under the contract between the seller and the buyer either the property is not to pass to the buyer until the goods are received by him, or the property in the goods passes to the buyer on delivery to the carrier but payment is not to be made by the buyer until he receives the goods, and in either of such cases the seller contracts with the carrier and does not, in so contracting, do so solely as the agent of the buyer then there would arise a special contract between the seller and the carrier. If the goods were lost in circumstances in which the carrier has broken the contract, the seller would be able to maintain an action against the carrier for the loss which he has suffered from such breach of contract. (See *Calcutta Steam Navigation Co., Ltd. v. de Mattos* (1863), 32 L.J.Q.B. 322, per Blackburn, J. at p. 328 and *Gardano v. Greek Petroleum Co., Ltd.*, [1961] 3 All E.R. 919.)

Such being the law it is now necessary to determine the application of that law to the facts as found by the Chief Justice. As I have said, the respondents, as sellers and consignors of the goods, would normally be acting purely as the agent for the buyers and thus would have no right to sue the appellants, as carriers, for breach of contract as they would not be a party to the contract. Are there any circumstances here which show that a special contract has been entered into between the respondents and the appellants which would give the respondents the right to sue? The Chief Justice found that such a contract existed. There is evidence to support that finding, which in any event has not been the subject of appeal. The Chief Justice found that the appellants would have looked to the respondents for the payment of the freight if that freight had not been paid by the buyers and this, of course, could only happen if the respondents were principals to the contract of carriage. Further, the Chief Justice found as a fact that according to the course of dealing between the respondents, as sellers, and the buyers, the buyers “would not pay until they had received the goods”. I understand this to mean, although I appreciate that it is not incapable of a different interpretation, that the sellers’ duty under the contract with the buyers was to give delivery to the buyers at the buyers’ place of business. Thus even though the property in the goods may have passed earlier to the buyers, nevertheless the sellers only became entitled to payment on the performance of their duty to deliver at the specified place to the buyers. If this is so, then clearly the sellers had an intimate interest in the contract of carriage and one which would amply justify the making of a special contract, even if ultimately it was intended that the freight should be borne by the buyers.

As there existed this special contract between the respondents, as sellers and consignors, and the appellants, as carriers, and as that contract was broken by the failure of the appellants to carry the goods safely to their destination, then

quite clearly the respondents had the right to sue the appellants. As that was the sole issue on the appeal the answer therefore is that the appeal must be dismissed.

In case, however, it should be assumed that, because the respondents, as sellers and consignors, could sue the appellants as carriers, this means that they could recover the full value of the goods, I should like to make it clear that this does not necessarily follow. A person who sues for breach of contract is only entitled to recover the amount of the loss which he has sustained from such breach, and the defendant is only liable to make good that loss once. On the one hand, if, under the contract of carriage, the carrier is liable to the buyer for the value of goods lost, he cannot also be liable to the seller for such value, as otherwise he would be liable twice in respect of the same loss. On the other hand, if the seller is entitled to recover the value of the goods lost from the buyer, then he cannot recover from the carrier any damage resulting from the failure to carry the goods safely as the seller, in fact, has suffered no such damage and cannot therefore recover the value of the goods twice. Equally well, if the seller has insured the safe carriage of the goods and has recovered the amount of the value of the goods from the insurance company, the seller cannot sue the carrier and thus recover that value from two different persons. This, however, does not mean that the insurance company, by subrogation and using the name of the seller, could not sue the carrier in order to recover the loss caused to the insurance company in paying the seller. Reference has been made in this case to the respondents receiving sums under a policy of insurance. It is not clear precisely what the position is, but I assume, although as I have said this is not the subject of any issue on the appeal, that the respondents in this case are not recovering in a personal capacity the value of the goods from two different persons. Nor will the respondents be able to sue the buyers on the basis of what I understand to be the contract as found by the Chief Justice between the buyers and the sellers.

For these reasons I agree with the Vice-President that the appeal be dismissed and there will be an order in the terms proposed by him.

Law JA: I agree with the judgment prepared by the learned Vice-President, and with the order proposed by him.

Appeal dismissed.

For the appellant:

A Lakha

Fraser Murray, Roden & Co, Dar-es-Salaam

For the respondent:

I Peera

Donaldson & Wood, Dar-es-Salaam

Kassamali Gulamhusein & Co (Kenya) Ltd v Kyrtatas Brothers Ltd
[1968] 1 EA 542 (CAM)

Division: Court of Appeal at Mombasa

Date of judgment: 4 July 1968

Case Number: 54/1967 (103/68)
Before: Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by: LawAfrica
Appeal from: High Court of Kenya – Wicks, J

[1] *Arbitration – Foreign Award – Enforcement in Kenya – Award alleged to be bad – Onus on party alleging this – Whether contrary to public policy to register such award for enforcement in Kenya – Arbitration (Foreign Awards) Act, ss. 4 (1) and 4 (2) (K.).*

[2] *Civil Practice and Procedure – Affidavit – Affidavit of information and belief – Whether sources of information and grounds of belief must be stated.*

[3] *Constitutional Law – Independence of Kenya – Effect on applied statutes – Whether Arbitration (Foreign Awards) Act still law although Convention on the Execution of Foreign Arbitral Awards not adhered to by Kenya since independence – Order in Council 1931 – Kenya Independence Order in Council 1963, s. 4 (1) and (8); Constitution of Kenya (Amendment) Act 1964, s. 14 and second schedule; Constitution of Kenya (Amendment) Act 1965, ss. 2 (1) and 6 and second schedule (K.).*

[4] *Evidence – Law – Evidence as to whether Kenya has acceded to an international convention – Presumption of accession from fact that current Act contains Convention – What evidence required – Act of State – Evidence Act, s. 60 (3) (K.).*

Editor's Summary

The appellant, a Kenya company, chartered a vessel from the respondent company, the owners, under a charterparty a clause in which required any dispute arising under the charter to be referred to arbitration in London. Disputes did arise and were duly arbitrated in London and the appellant company was adjudged liable to pay the respondent company a sum of £7,737 15s. 4d. with interest assessed at £1,500 and costs. The validity of this award was not challenged and the award was final under English law. The respondent company then applied to file this award in the High Court of Kenya under the Arbitration (Foreign Awards) Act, and for leave to execute it as if it were a decree of the High Court. This application was granted. Against this the appellants appealed, arguing: (i) that the Act was no longer in force since Kenya's independence because Kenya had not since then acceded to the essential international Convention; (ii) that the affidavit filed by the respondent company was defective because it failed to distinguish between matters stated on information and belief and matters within the deponent's own knowledge; (iii) the award was bad and it would be contrary to natural justice, and therefore to public policy under s. 4 (1) and s. 4 (2) (c) of the Act, to register it for enforcement in Kenya.

Held –

- (i) the Arbitration (Foreign Awards) Act is now and has never ceased to be part of the law of Kenya;
- (ii) the affidavit was an affidavit of information and belief and it was unnecessary for the deponent to state the sources of his information and belief; the affidavit was regular (*In re J. L. Young Manufacturing Co. Ltd.* (3) adopted; *Assanand's case* (1) and *Caspair Ltd.'s case* (2) distinguished);

(iii) the award was good.

Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Assanand & Sons (Uganda), Ltd. v. East African Records, Ltd.*, [1959] E.A. 360.
- (2) *Caspair, Ltd. v. Harry Gandy*, [1962] E.A. 414.
- (3) *In re J. L. Young Manufacturing Co., Ltd.*, [1900] 2 Ch. 753.

July 4, 1968. The following considered judgments were read:

Judgment

Law JA: This appeal arises out of a charterparty, the appellant company being the charterers and the respondent company being the owners of the chartered vessel. By art. 23 of the charter:

“Any dispute arising under the charter to be referred to arbitration in London one Arbitrator to be nominated by the Owners and the other by the Charterers, and in case the Arbitrators shall not agree then to the decision of an Umpire to be appointed by them, the award of the Arbitrators or the Umpire to be final and binding upon both parties.”

Various items of dispute did in fact arise between the parties upon the termination of the charter, and these were duly referred by the parties to the decision of arbitrators appointed by each of them in accordance with art. 23 aforesaid. The arbitrators were unable to agree. They accordingly nominated an umpire and referred the whole matter to him. On May 14, 1964, the umpire published his award, under which he adjudged that the charterers were liable to pay to the owners the sum of £7,737 15s. 4d. with interest assessed at £1,500 and costs. The validity of this award has not been challenged in England and the award is final according to English law. The owners applied to the High Court of Kenya under the Arbitration (Foreign Awards) Act, Cap. 50 of the Revised Laws of Kenya, for the award to be filed in the High Court and for leave to execute the award as if it were a decree of the High Court. This application was granted by the High Court at Mombasa (Wicks, J.) on July 25, 1967. The charterers now appeal against the decision of Wicks, J. The first ground of appeal raises a point which was not taken in the court below. It is that since the attainment of independent sovereign status by Kenya the Arbitration (Foreign Awards) Act is no longer effective, so that there exists no machinery for filing and executing foreign awards in Kenya. As I understand the argument of Mr. Mackie-Robertson, who appeared for the charterers, on this ground of appeal, it is that the Arbitration (Foreign Awards) Act, which I shall refer to hereinafter as “the Act”, depends for its effectiveness on Kenya’s adherence to the Convention on the Execution of Foreign Arbitral Awards 1924, hereinafter referred to as “the Convention”, which is set out as a Schedule to the Act. There is no evidence that Kenya has adhered to the Convention since achieving sovereign independent status. The United Kingdom, as one of the High Contracting Parties to the Convention, had the right under Art. 10 of the Convention to apply the convention to its colonies and protectorates, and did so in respect of the then Colony of Kenya by Order in Council dated July 23, 1931, as set out in Vol. XI of the Revised Laws of Kenya, Group 6, p. 4. Mr. Mackie-Robertson submitted that as the Crown has no power to act on behalf of an independent Kenya, the adherence to the Convention made by Order in Council is now of no effect; Kenya since independence has never adhered to the Convention, and the Act has accordingly ceased to have effect since Kenya became independent, so that it is now no longer competent to register foreign awards in Kenya. To this Mr. Bryson for the owners replied that the various constitutional instruments establishing Kenya as a sovereign independent State have effectively preserved both the Order in Council applying

the Convention to Kenya, and the Act itself. The first such instrument was the Kenya Independence Order in Council 1963, and by s. 4 (1) of that Order:

“... the existing laws shall ... continue in force after the commencement of this Order as if they had been made in pursuance of this Order, but they shall be construed with such modifications, adaptations, qualifications and exceptions, as may be necessary to bring them into conformity with this Order.”

The expression “existing law” was defined in s. 4 (8) of the Order as meaning any Ordinance and other enactment having effect as part of the law of Kenya immediately before the commencement of the Order, and any Act of Parliament or Order of Her Majesty in Council so having effect. Clearly s. 4 of the Kenya Independence Order in Council had the effect of preserving both the Act and the Order in Council of 1931 as part of the law of independent Kenya. Section 4 (1) of the Kenya Independence Order in Council 1963, was repealed by the Second Schedule to the Constitution of Kenya (Amendment) Act 1964 (Act No. 28 of 1964), but s. 14 of that Act continued the validity of existing laws, just as s. 4 (1) of the Kenya Independence Order in Council 1963, had done. Section 14 of the Act of 1964 was in turn repealed by the Second Schedule to the Constitution of Kenya (Amendment) Act 1965 (Act No. 14 of 1965), but s. 6 of that Act again made provision for the continuation of existing law, that expression being defined in s. 2 (1) of that Act as meaning:

“... any Act, enactment, law, rule, regulation, order or other instrument having effect as art of the law of Kenya or any part thereof immediately before December 12, 1964, or any Act of the Parliament of the United Kingdom or Order of Her Majesty in Council ... so having effect.”

It seems to me clear beyond any doubt that the Order in Council of 1931, applying the Convention to Kenya, and the Act itself, are now and have never ceased to be part of the law of Kenya. What is more, by s. 11 (1) of the Laws of Kenya (Revision) Act (Cap. 1) the Attorney-General is charged with the duty of preparing an annual Supplement of the Laws of Kenya. Three such annual supplements have appeared, the latest in March, 1967, and there is no suggestion in any of them that the Act, or the Order in Council of 1931, do not form part of the law of Kenya today. If independent Kenya did not consider itself a party to the Convention, it would have repealed the Act, and not allowed it to continue to appear in the Revised Laws of Kenya. I consider the first ground of appeal to be devoid of merit.

Another ground of appeal raising a point which was not taken before the High Court is ground 7 which is to the effect that the High Court should not have accepted the affidavit of Mr. I. M. McLachlan, the owners’ London solicitor, in support of the application to file the award, on the ground that the affidavit was defective because of the deponent’s failure to distinguish between matters stated on information and belief and matters within the deponent’s knowledge. In support of this ground of appeal, Mr. Mackie-Robertson relied on *Assanand & Sons (Uganda), Ltd. v. East African Records, Ltd.*, [1959] E. A. 360, and *Caspair, Ltd. v. Harry Gandy*, [1962] E.A. 414, in which this court held that a court should not act on an affidavit which did not distinguish between matters stated on information and belief and matters to which the deponent swears from his own knowledge. The relevant paragraph of Mr. McLachlan’s affidavit reads:

“12. The contents of this affidavit are true to the best of my information and belief based on documents submitted to me by the claimants as their solicitor in the Arbitration proceedings referred to above.”

In my opinion this ground of appeal is misconceived. Mr. McLachlan was not purporting to depone to facts within his own knowledge: he was making what is known as an affidavit of information and belief, and in such a case it is necessary

for the deponent to state the sources of his information and belief (*In re J. L. Young Manufacturing Co., Ltd.*, [1900] 2 Ch. 753). This Mr. McLachlan has done. As he was not purporting to swear to facts within his own knowledge, there was no need for him to distinguish such matters from matters stated on information and belief, with which his affidavit was exclusively concerned. I consider that Mr. McLachlan's affidavit was regular in form and rightly admitted, and it was conceded before the learned judge that the affidavit established that the conditions for the enforcement of awards listed in s. 4 (1) of the Act had been complied with. This only leaves for consideration the grounds of appeal that the judge should have refused to order the filing of the award having regard to the last sentence of s. 4 (1) which reads:

“... and the enforcement thereof must not be contrary to public policy or the law of Kenya,”

and the ground that the award exceeded the scope of the submission, and that having regard to s. 4 (2) (c) of the Act the learned judge should have held it to be unenforceable for that reason. Mr. Mackie-Robertson submitted that the umpire's award is bad on the face of it for uncertainty, that it is based on assumptions and hypotheses, and that it would be contrary to natural justice, and therefore to public policy, to register it for enforcement in Kenya. If there was any substance in these complaints, I would have expected the charterers to have taken steps to have the award set aside in England instead of allowing it to become final and binding in that country as they have done. Mr. Mackie-Robertson's complaints are directed at that part of the award in which the umpire, in admittedly obscure and diffuse language, states that with the agreement of the parties he is proceeding with his adjudication on the assumption that wherever the owners are claiming reimbursement of moneys spent or damage to the ship they have not received the moneys from the charterers, and wherever the charterers are complaining, they have withheld hire in the amount of their complaint. The umpire went on to say that his award should be regarded

“as a guide to the preparation of the final time-charter account so that, for example, if sums which I assume to have been deducted from the hire prove not to have been then, on the understanding that it is further agreed by the parties

- (a) any such ultimate adjustment must, if in dispute, be the subject of another reference and
- (b) in any other such reference neither side takes a point on time-limit,

I should be wholly agreeable.”

This passage can hardly be described as a model of lucid English prose. The umpire then went on to consider the various items in dispute and made clear and definite findings on each one, and in the result awarded the owners £7,737 15s. 4d. with interest in the sum of £1,500. Mr. Mackie-Robertson submitted that, in the umpire's own words, his award was not intended to be final but only “a guide to the preparation of the final time-charter account”, so that not being a final award it was not capable of registration as such. I do not read the relevant extract in the award in this way. It seems to me that what the umpire meant was that if any particular item in his award turned out not to have been withheld from the hire, or to have been received by the owners, contrary to the assumptions on which he based his award, then that item should be the subject of another reference. As no attempt was in fact made by either party to refer further any of the items dealt with by the umpire, I can only infer that the assumptions on which the umpire based his award were accepted by the parties, so that no question arose of the umpire's findings being regarded only “as a guide”. As regards the ground of appeal that the award was not enforceable because it contained decisions on matters beyond the scope of the agreement for decision, the learned

trial judge held that every item dealt with in the award was to be found in the submission and that every item referred to in the submission had been dealt with in the award. It has not been shown to my satisfaction that the learned judge erred in this respect. Mr. Mackie-Robertson's main point on this ground is that the owners in their written case only claimed £6,722, and he submits that as they were awarded a greater sum, the umpire must have considered matters outside the scope of the submission. I do not think this necessarily follows. The arbitrators were appointed to assess the rights and liabilities of the parties generally, and the owners' claim to be entitled to £6,722 was countered by a claim on the part of the charterers for over £2,000. After considering the items referred to him, the umpire awarded the owners £7,737. As it has not been shown by the charterers, on whom the onus lies to do so, that in arriving at this figure the umpire in fact took into consideration any item not to be found in the submission, I do not see how the total sum awarded by the umpire can be challenged. I consider the owners' claim to have been in the nature of an assessment of their entitlement which did not impose any limitation on the scope of the reference to arbitration. I see no merits in this appeal, which I consider should be dismissed with costs, with a certificate for two advocates.

Sir Charles Newbold P: The facts relating to this appeal are set out in the judgment of Law, J.A., which I have had the advantage of reading in draft. I agree with his conclusion, but I would like to add a few words on two matters.

The first matter is the submission that independent Kenya has not acceded to the Convention contained in the Schedule to the Arbitration (Foreign Awards) Act (Cap. 50 and hereinafter referred to as the Act) and that as a result the Act is no longer effective. No evidence has been led as to whether or not independent Kenya acceded to the Convention. As the Convention is contained in a Schedule to a current Kenya Act, it must be presumed in the absence of anything to the contrary that independent Kenya has acceded to it. If the appellant wished to challenge such a presumption he should either have filed an affidavit by the responsible Minister stating whether or not Kenya had acceded to the Convention, or, as the matter relates to an act of state, have asked the court to take judicial notice of the position and, for that purpose, have produced under s. 60 (3) of the Evidence Act a letter written by, or on the direction of, the responsible minister setting out the position. This was not done. Thus there is no reason why the court should not act upon the presumption that the Convention was acceded to. In any event, even if independent Kenya has not acceded to the Convention, the Act continues to be part of the law of Kenya and the efficacy of this Act does not depend in any way whatsoever upon the accession or otherwise to the Convention.

The second matter to which I wish to refer is the argument of the appellant that the foreign award is not enforceable first, by reason of the provisions of s. 4 (1) of the Act and, secondly, by reason of the provisions of s. 4 (2) of the Act. In so far as the argument relates to s. 4 (1), I consider that it is not open to the appellant to make these submissions as in the High Court it was conceded by him that the requirements of that subsection had been met; and the judge so stated in his ruling. As far as the argument relates to s. 4 (2), it was submitted that the award contained a decision "on matters beyond the scope of the agreement for arbitration". The words "agreement for arbitration" are capable of meaning either the arbitration clause in the contract between the parties or the submission of the matters in dispute to the arbitrators. Without deciding the proper interpretation of these words, I incline to the view that they mean both as it would seem to me as wrong for the courts to enforce a foreign award on a matter which was never submitted to arbitration as to enforce an award on a matter in relation to which there is no provision for arbitration. In this case it was submitted that the umpire gave a decision on matters not referred to him.

The onus of proving that such was the position lay on the appellant. While the position is not entirely clear, the appellant has not in my view proved that the umpire gave a decision on matters other than those submitted to arbitration. I am the more confirmed in that view as the appellant in his affidavit stated generally that he appointed his arbitrator “to decide what money, if any, pursuant to the terms of the said charterparty the applicant herein owed the respondent or the respondent owed the applicant” and this seems to be precisely what the award does.

For these reasons I agree that the appeal should be dismissed and there will be an order in the terms proposed by Law, J. A.

Sir Clement De Lestang V-P: I agree.

Appeal dismissed.

For the appellant:

*JA Mackie-Robertson, QC, and ST Abdulhussein
Atkinson, Cleasby & Satchu, Mombasa*

For the respondent:

*JEL Bryson and IT Inamdar
Bryson, Inamdar & Bowyer, Mombasa*

Jiwaji and others v Jiwaji and another [1968] 1 EA 547 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	4 July 1968
Case Number:	51/1967 (104/68)
Before:	Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Wicks, J

[1] Contract – Implied term – Intention of parties – Literal construction departed from where intention of parties clear.

[2] Document – Construction – Intention of parties – Implication of term if necessary – Literal construction departed from.

Editor’s Summary

On September 28, 1959 the defendants (appellants) and the plaintiffs (respondents) settled a suit between

them by a written agreement, which required a valuation to be made of a shareholding and an interest in a partnership. This valuation was to be made and certified by two named accountants and was “to be effected as soon as possible if possible within three months”. Clause 3 (a) of the agreement required the sum so found due to be paid by the defendants to the plaintiffs by ten yearly instalments. Clause 3 (b) read: “The first payment to be made within three months of the date of the Accountants’ Certificate herein referred to but in any case the first instalment . . . to be paid within six months of the date of this Agreement – the Accountants if required (for this purpose) to provisionally assess the amount due”. The six months’ period would thus be up on March 28, 1960. The parties did not, however, call upon the accountants to begin work on the valuation until January 21, 1960, so that it was inevitable that the first payment, if made within three months of the date of the Accountants’ certificate would be made after the six months’ period. The accountants therefore, following the latter part of Clause 3 (b), made a provisional assessment on March 29, 1960; and on that same day the defendants made a payment of the first instalment. There was then a long delay until February 1, 1962, when the accountants finally certified the sum, at a much higher figure than their provisional assessment, and they published their certificate to the parties in May, 1962.

The defendants then paid, on June 11, 1962, the balance of the first instalment, i.e., they made up the difference between their original payment in March, 1959, and the larger amount due as a result of the higher valuation. Thereafter, every year in June the defendants paid another instalment, so that by June, 1966, they had paid five instalments. The plaintiffs, however, contended that the first instalment should have been paid in March, 1960, so that an instalment should have been paid every March since then, i.e., that they should, by 1966, have had seven payments and not five. The plaintiffs sued the defendants in October, 1966, claiming two instalments. The trial judge found for the plaintiffs and the defendant appealed.

Held – (by de Lestang, V.-P., and Law, J.A.; Newbold, P., dissenting): the parties clearly intended that the instalments should commence at the latest within six months of the agreement and that there should be an interval of a year between each instalment and if necessary a term to give effect to this should be implied into the agreement; therefore the defendants were in default of two instalments (*Campling Bros. v. United Air Services* (1) applied).

Appeal dismissed.

Cases referred to in judgment:

- (1) *Campling Bros. v. United Air Services* (1952), 19 E.A.C.A. 155.
- (2) *Smith v. Cooke*, [1891] A.C. 297.
- (3) *British Movietonews v. London and District Cinemas*, [1952] A.C. 116.

July 4, 1968. The following considered judgments were read.

Judgment

Sir Clement De Lestang V-P: This appeal concerns the interpretation of an agreement entered into between the appellants and the respondents on September 28, 1959, for the settlement of a suit then pending between them in which the respondents were the plaintiffs and the appellants the defendants. For the sake of convenience I shall refer in this judgment to the appellants as the defendants and the respondents as the plaintiffs.

Clause 1 of the agreement provides for a valuation of the share-holding of one Abdulali Jiwaji (hereinafter called the deceased) in two companies and his interest and/or indebtedness, if any, in a partnership. Clause 2 provides for the valuation to be made by two named accountants, one to be nominated by each party, with power to nominate an accountant of their choice in default of agreement and ends with this sentence: "Valuation to be effected as soon as possible if possible within three months." Clause 3 is the crucial clause for the purpose of this case and must be stated in full:

- "3. (a) The share of the deceased in the two companies and the partnership – plus or minus – the personal indebtedness to be certified by accountants and such sum to be paid by the defendants to the plaintiff as follows namely: –
- (i) by ten yearly instalments.
 - (ii) In addition the defendants will pay in lieu of all other claims (including interest) an additional ten per cent. making 110 per cent. in all. This ten per cent. additional to be paid as to one half with the first instalment and as to one half with the second instalment.

- (b) The first payment to be made within three months of the date of the Accountants' certificate herein referred to but in any case the first instalment plus moiety to be paid within six months of the date of

this agreement – the accountants if required (for this purpose) to provisionally assess the amount due.”

The accountants were not called upon by the advocates of the parties to embark upon their task until January 21, 1960. It was then too late to give effect to the first part of cl. 3 (b) as the payment of the first instalment therein provided for would fall due within more than six months of the date of the agreement. So the latter part of this sub-clause came into operation, and accordingly, on March 29, 1960, the accountants made a provisional assessment of the deceased's entitlement at Shs. 500,000, and on the same day the appellants effected payment of the first instalment which, on the basis of the provisional valuation, amounted to Shs. 75,000. A long delay then occurred and it was not until February 1, 1962, that the accountants issued their certificate valuing the deceased's entitlements in the sum of Shs. 887,969/28. This certificate was published to the parties during the first week of May, 1962. Pursuant to the said certificate the defendants, on June 11, 1962, effected payment of the balance of the first instalment, that is to say, they made up the difference between the Shs. 75,000 already paid and the amount which should have been paid as a first instalment under the accountants' certificate. Since then, every year, in the month of June, the appellants have effected payment of one instalment so that by the end of June, 1966, they had paid five instalments altogether. In October, 1966, the plaintiffs brought a suit against the defendants in which they alleged that the five instalments paid were in respect of the years 1960 to 1964 and claimed payment of the instalments for the years 1965 and 1966. Their contention was that the first instalment was payable before March 28, 1960, and that the subsequent instalments fell due on the anniversary of that date.

For the defendants it was contended that the first instalment was to be paid within three months of the date of the accountants' certificate and subsequent instalments on the anniversary of the date of payment of that first instalment. The learned trial judge, after examining the relevant provisions of the agreement said:

“The meaning is clear, the first instalment is to be paid within six months of the date of this agreement, that is before March 28, 1960. Should the accountants by this time not have issued their certificate they are to assess a provisional sum for the purpose for the payment of the first instalment. The first payment is clearly stated to be the first instalment and it is equally clearly stated that this is to be paid within six months of the date of the agreement, that is before March 28, 1960. Payment was to be made “by ten equal yearly instalments” with the result that the second instalment was payable before March 28, 1961.”

He held that at the time of the filing of the suit two instalments were due and gave judgment for the plaintiffs. Against this decision the defendants appealed.

Mr. Inamdar's contention for the appellants may, I think, be fairly summarised thus. As cl. 3 (a) (i) provides for the payment of the amount “certified” by the accountants “by ten equal yearly instalments” the accountants' certificate was a condition precedent to the payment of any instalment. An exception, however, is made in the case of the first instalment for which specific provision is contained in the latter part of cl. 3 (b). This instalment is, however, a provisional one, based on a provisional assessment of the deceased's entitlement and must be adjusted within three months of the issue of the certificate. In the absence of specific provision for the payment of any other provisional instalments, none was due pending the issue of the certificate, and the instalments began to run on the anniversary date of the completion of the first instalment at yearly intervals.

For the respondents Mr. Mackie-Robertson contended that the agreement contemplated the payment of consecutive yearly instalments over a maximum

period of nine years and six months commencing with the payment of the first instalment within six months of the date of the agreement. He also submitted that it was the intention of the parties that the provisional instalment should continue yearly pending the issue of the accountants' certificate, when adjustments would be made in the payments.

It seems to me that Mr. Inamdar's contention rests solely on a literal construction of the agreement and ignores the intention of the parties disclosed therein. I cannot accept that until the first instalment is made up to the correct figure it is not a true first instalment, nor can I find in the agreement itself any support for his contention that the defendants have three months from the issue of the certificate to complete that instalment. As I understand cl. 3 (b) the two provisions for payment therein contained are mutually exclusive and once the second provision requiring payment within six months of the agreement applies, the first provision for payment within three months of the certificate becomes redundant and should be ignored. Reading cl. 3 as a whole it seems to me beyond doubt that the parties intended that the instalments should commence at the latest within six months of the agreement and that there should be an interval of a year between each instalment. They clearly envisaged that the first instalment, if made under the second part of cl. 3 (b), could not initially be equal with the others since it would be based on a provisional valuation, but there is nothing in the agreement to prevent it being adjusted when the certificate would be issued. Much was made of the fact that there is no provision for ascertaining the amount of the second and third instalments in the events that occurred. This is quite true but surely the only basis on which such payments could be made pending the issue of the accountants' certificate is on the provisional assessment and, if necessary, I would imply such a term in the agreement.

The courts will not, of course, make contracts for the parties but they will give effect to their clear intention. In the present case the parties made express provision for the date of payment and the amount of the first instalment should the certificate not materialise in time. They never intended that there should be a gap of more than a year between each instalment. They did not make similar provision for a second or subsequent instalments because they never contemplated that it would take so long to produce the certificate. I have no doubt, however, that if anyone had raised that point at the time of the agreement the answer of the parties would have been "but the certificate will be issued by then and if not, the provisional instalments will continue until the accountants produce their certificate". For these reasons I agree with the learned trial judge that the defendants were in default of two instalments.

There is another matter which must be mentioned. In entering judgment for the plaintiffs the learned trial judge awarded interest from dates prior to the filing of the suit and ground 8 of the memorandum of appeal attacks this award. Mr. Mackie-Robertson did not seek to support this award of interest and we were informed at the commencement of the hearing of the appeal that he conceded the point. This award of interest must therefore be set aside.

I would accordingly dismiss the appeal, subject to the award of interest prior to the filing of the suit being deleted. As it was the respondents who had asked for such interest in the plaint and the appellants had to come to this Court to have the award corrected I would order the appellants to pay four-fifths of the costs of the appeal.

Law JA: By an agreement in writing dated September 28, 1959, the appellant agreed to buy from the respondents, who are the administrators of the estate of Abdulali Jiwaji, deceased, the shares and interest of the deceased in two companies and a partnership, at a valuation to be ascertained by two accountants named in the agreement. By cl. 2 of the agreement the valuation was to be effected

as soon as possible “if possible within three months”. By cl. 3 (a) (i) of the agreement, the amount found owing under this valuation was to be paid by the appellants by ten equal yearly instalments. Clause 3 (b) provided as follows:

“The first payment to be made within three months of the date of the accountants’ certificate herein referred to but in any case the first instalment . . . to be paid within six months of the date of this agreement – the accountants if required (for this purpose) to provisionally assess the amount due.”

It is thus clear that the parties intended that the amount found due should be paid in full within a period of about ten years from the date of the agreement, the first payment to be made not later than six months after the date of the agreement, that is to say, on or before March 27, 1960 and the nine subsequent instalments to be paid annually thereafter on the anniversary of the first payment. The valuation was not completed within six months, so the accountants made a provisional valuation in accordance with cl. 3 (b) on March 29, 1960, and the first payment was made on the same day by the appellants to, and accepted by, the respondents. Although this payment was made two days outside the period agreed by the parties, nothing turns on this as the parties must be taken by their conduct to have agreed to this short extension of time.

Had the accountants produced their definite and final valuation within the next twelve months, no difficulties would have arisen. The second instalment, based on that valuation, would have been paid on or before March 29, 1961, and the remaining eight instalments annually thereafter, so that the appellants would have discharged their obligations by March 29, 1961, within ten years of the date of the agreement.

Unfortunately a situation arose which was not foreseen by the parties, when they entered into the agreement. The final valuation was not published to the parties until the first week in May, 1962, and the appellants then made up the amount of the provisional first instalment to what it should have been under the final valuation by a payment made on June 11, 1962, and thereafter they paid further instalments in June, 1963, 1964, 1965 and 1966. In October, 1966, the respondents filed a suit claiming that the appellants owed two further instalments. The respondents’ case is that the first instalment was due on or before March 28, 1960, and they have appropriated the five instalments paid to the years 1960, 1961, 1962, 1963 and 1964. The appellants’ case is that they have fulfilled their obligations under the agreement by paying the first instalment within three months of the accountants’ certificate in June, 1962, and by paying regular annual instalments thereafter, so that they are not in arrears of any instalment.

The learned trial judge held in favour of the respondents. He said, in relation to the agreement:

“The meaning is clear, the first instalment is to be paid within six months of the date of this agreement, that is before March 28, 1960. Should the accountants by this time not have issued their certificate they are to assess a provisional sum for the purpose of the payment of the first instalment. The first payment is clearly stated to be the first instalment and it is equally clearly stated that this is to be paid within six months of the date of the agreement, that is before March 28, 1960. Payment was to be made ‘by ten equal yearly instalments’ with the result that the second instalment was payable before March 28, 1961.”

In other words, the learned judge has interpreted the agreement so as to cover the position, which arose but was not foreseen by the parties, that the accountants’ final certificate was not produced within 1½ years of the date of the agreement, He has held that a second instalment, based on the provisional valuation,

became payable on the anniversary of the first payment, which is described as the first instalment in cl. 3 (b) of the agreement.

The whole question in this appeal is whether the learned judge was justified in so interpreting the agreement. Mr. Inamdar, for the appellants, submits that he was not. He argues that the first instalment was not payable until after the issue of the certificate, and that the first payment referred to in cl. 3 (b), although described as an instalment, was in fact intended to be no more than a payment on account of the first instalment, which was not due and could not be ascertained until the certificate was issued. Mr. Mackie-Robertson submits that the date of the first payment, which the parties described as the first instalment, governs the date of the subsequent instalments, and that to hold otherwise would be to extend the period of payment to over twelve years, against the parties' clear intendment that payment of all the instalments should be made within ten years.

If Mr. Inamdar's contention is correct, then if the accountants had taken, for example, over five years instead of over two years to produce their final certificate, the period of payment would have been extended to over fifteen years. In my view the parties assumed that the certificate would appear within a reasonable time, probably within a year at the most, and their agreement was based on that assumption, and if it becomes necessary to imply a term into the agreement to give effect to this assumption, and to the parties' clear intention that full payment should be made within ten years, then I consider that such a term must be implied. I agree with Sir Charles Newbold, P., whose judgment I have had the advantage of reading in draft, that where there is no ambiguity in an agreement it must be construed according to the clear words used by the parties, but I consider that in this case the agreement became ambiguous as the result of the accountants' delay in producing their certificate. No provision was made in the agreement to cover this contingency, and I am confident that if the question had been put to the parties to the agreement at the time of its execution "what is to happen if the accountants' certificate is delayed for two, five, or even ten years?" the unanimous answer would have been "of course regular annual instalments must be paid under cl. 3 (b) based on the provisional valuation". Any other answer would in my view have been most unlikely in view of the parties' clearly stated intention that payment should be made by ten equal annual instalments, the first to be paid within six months of the date of the agreement. I consider that in the circumstances of this case such a term must necessarily be implied into the agreement, to give it efficacy in accordance with the clear intention of the parties (*Campling Bros. v. United Air Services* (1952), 19 E.A.C.A. 155).

For these reasons I would dismiss this appeal. I agree with the order proposed by the Vice-President.

Sir Charles Newbold P: The facts relating to this appeal are set out in the judgment of Sir Clement De Lestang, V.-P., which I have had the advantage of reading in draft. I find it unnecessary to re-state those facts save in so far as may be necessary to give point to my reasoning; and in referring to the parties I shall use the same terminology as he uses.

The issue on this appeal depends upon the true construction of an agreement between the parties whereby the defendants agreed to pay by instalments to the plaintiffs the value of certain property of a deceased person. Under the agreement that value was to be determined by two accountants appointed by the parties and the last sentence of cl. 2 of the agreement reads:

"Valuation to be effected as soon as possible if possible within three months."

In fact, the hope that the valuation would be made within three months could never have been realized as the parties did not appoint the accountants who were to make the valuation until nearly four months after

the date of the agreement.

As the parties jointly took action to implement the agreement after the period of three months had expired, I consider that the reference to such period should be completely disregarded in construing the agreement. The trial judge, in my view wrongly, attached considerable importance to the reference to this period.

The issue really depends upon the true construction of cl. 3, and I set out the relevant words in paragraphs (a) and (b) of that clause:

- “(a) The share of the deceased . . . to be certified by accountants and such sum to be paid by the defendants to the plaintiff as follows namely:
 - (i) by ten equal yearly instalments.
 - (ii) In addition the defendants will pay in lieu of all other claims (including interest) an additional ten per cent, making 110 per cent, in all. This ten per cent. additional to be paid as to one half with the first instalment and as to one half with the second instalment.
- (b) The first payment to be made within three months of the date of accountants’ certificate herein referred to but in any case the first instalment plus moiety to be paid within six months of the date of this agreement-the accountants if required (for this purpose) to provisionally assess the amount due.”

From para. (a) it is clear that what is to be paid by ten equal yearly instalments is the share of the deceased as certified by the accountants. Thus, subject to any other provision of the agreement, the first of the ten equal yearly payments could not be paid until the certificate was given. Further, sub-para. (ii) makes it clear that the additional ten per cent. is to be paid by equal moieties with the first two payments which, subject to any other provision in the agreement, it would not be possible to do until the certificate was given. Thus, from the whole of para. (a), which is the paragraph in the agreement dealing with what has to be paid and the manner of payment, it is quite clear that the first of the ten equal yearly payments is not payable until the certificate is given and, also, that neither the first payment, nor the first or the second of the additional payments, could be made until the total amount to be paid was known. Is there any other provision in the agreement which can possibly place different construction on these perfectly clear words? I have already pointed out that as the parties had jointly taken action under the agreement after the period of three months referred to in cl. 2 had expired, any reference to that period should be disregarded. The only other provision which is pointed to as leading to a different construction is para. (b).

The opening words of that paragraph clearly state that the first payment (which must be the first of the ten equal yearly payments referred to in para. (a)) is to be made within three months of the date of the accountants’ certificate. These words, therefore, merely emphasise that the first of the ten equal yearly payments must be subsequent to the certificate. The paragraph then continues “but in any case” the first payment and the first moiety are to be paid within six months of the date of the agreement and that “for this purpose”, which can be nothing other than the purpose of the first payment, the accountants may provisionally assess the amount due. It is quite clear that this can be nothing other than a special provision in certain eventualities for a provisional assessment by the accountants in order to enable a provisional payment to be made. But this in no way affects the main provisions of the agreement relating to the time, manner and amount of the ten equal yearly payments. That this is so appears beyond question from the fact that no provision is made for subsequent provisional payments. As in the eventualities which occurred the first payment was merely a provisional payment, this in no way affected the main requirement in the clear words of para. (a) that the first and each subsequent payment of the ten equal

yearly payments was to be made after the receipt of the certificate setting out the total sum to be paid. Were it otherwise it would mean that the last part of para. (b) dealing with a provisional payment has completely negated the perfectly clear words of the whole of para. (a) and the first of para. (b).

It is urged that the parties obviously contemplated that the last payment would be made about 10½ years from the date of the agreement and that either the agreement should be construed, or that there should be an implied term, to give effect to this intention. I accept that the parties probably contemplated that the total sum would be paid off earlier than will probably be the position. But where there is no ambiguity in an agreement it must be construed according to the clear words actually used by the parties; and it would be quite wrong to adopt a different construction or to imply a term to the contrary effect. As Lord Halsbury, L.C., said in *Smith v. Cooke* ([1891] A.C. at p. 299):

“I must say I for one have always protested against endeavouring to construe an instrument contrary to what the words of the instrument itself convey, by some sort of preconceived idea of what the parties would or might have intended when they began to frame their instrument.

“... I think I am not entitled to put into the instrument something which I do not find there, in order to satisfy an intention which is only reasonable if I presume what their intentions were. I must find out their intentions by the instrument they have executed; and if I cannot find a suggested intention by the terms of the instrument which they have executed I must assume that their intentions were only such as their deed discloses.”

It is said that as the parties must have contemplated that the amount would be paid off in under eleven years, therefore it must be implied that they intended the provisional payment to be the first of the ten equal yearly payments and also, if necessary, that second and third provisional payments should be made. If they so intended they certainly did not state their intention. An unanticipated turn of events does not entitle a court to qualify the terms of an agreement for the purpose of doing what seems to it just and reasonable (see *British Movietonews v. London and District Cinemas*, [1952] A.C. 116). Nor should a term be implied in an agreement unless it is necessary to give efficacy to the agreement and it is clear that both parties would have accepted the term (see *Campling Bros. v. United Air Services* (1952), 19 E.A.C.A. 155). In this case the agreement undoubtedly has efficacy even if the total amount is not paid off as quickly as might have been originally contemplated.

As I have said, I accept that the parties probably did not contemplate the delay which has in fact occurred, but I am by no means satisfied that had it been contemplated they would both have agreed to a term on the lines on which it is urged that the agreement should be construed. It is fundamental to the construction of an agreement that a term should not be implied in an agreement unless the court is satisfied that had the matter been brought to the attention of the parties both of them, and not merely one of them, would have agreed to the term being inserted in the agreement. I have the gravest doubts from the actions of the parties that they both intended that the agreement should be construed in the manner in which the plaintiffs many years later urge that it should be construed. The provisional payment was made on March 29, 1960, but the certificate was not known to the parties till May, 1962. On the one hand the agreed facts do not set out that the plaintiffs took the action which they were required to take under cl. 4 if the provisional payment was to be regarded as the first of the ten equal yearly payments. On the other hand no payment subsequent to the provisional payment was made until June, 1962, when the difference between the amount provisionally paid in March, 1960, and the true amount due on the first payment was paid. Surely if both parties intended that the provisional payment of March, 1960,

should be, subject to later adjustment, the first of the ten equal yearly payments the agreed facts would have stated that the plaintiffs took the action required of them on that basis and further provisional payments would have been made in or about March, 1961, and March, 1962, by the defendants? I consider, in view of the clear words which the parties have used in their agreement, that it would be very wrong to construe that agreement differently from the clear meaning of the words they have used.

For these reasons I would allow the appeal, set aside the judgment and decree of the High Court and substitute therefor a judgment and decree dismissing the plaint with costs. The other members of the Court, however, are of a different view, so there will be an order in the terms proposed by Sir Clement De Lestang, V.-P.

Appeal dismissed, subject to award of interest prior to date of filing suit being deleted. Appellants to pay four-fifths of the costs.

For the appellants:

IT Inamdar

Bryson, Inamdar & Bowyer, Mombasa

For the respondents:

JA Mackie-Robertson, QC and YA Jiwaji

Ahmedali YA Jiwaji, Mombasa

Collector v Heptulla and others [1968] 1 EA 555 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	5 July 1968
Case Number:	6/1967 (105/68)
Before:	Sir Charles Newbold P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Kenya – Chanan Singh, J

[1] *Compulsory Purchase – Compensation – Assessment – Evidence of valuers – How to be treated.*

[2] *Compulsory Purchase – Compensation – Assessment – Value of land – Part of land shown as intended for roads on approved subdivisional plan – Whether plan to be taken into account – Indian Land Acquisition Act, s. 6 (K.).*

Editor's Summary

The City Council of Nairobi decided to purchase compulsorily certain land owned by the respondents for a highway improvement scheme. Under the Indian Land Acquisition Act a Collector was duly appointed to assess the value of the land. The Collector decided, as a matter of law, that part of the land, which had been shown as intended for roads on an approved subdivisional plan, was of no value, and on that basis assessed the value of the land at £1,737. He also, in case he was wrong in his decision on the law, made an alternative assessment. At the request of the respondents, the Collector referred the case to the High Court, where the judge decided that the Collector was wrong on the law and that the plan should be ignored: and further, after hearing a number of witnesses including five valuers, valued the land at £12,000, which, increased by fifteen per cent. under s. 23 (2) of the Act, made a total award of £13,800. The Collector appealed, and the only issue on the appeal was the matter of law. The respondents cross-appealed, challenging the judge's valuation on the facts as being too low.

Held –

- (a) on the cross-appeal, the judge had misdirected himself about the evidence of the valuers and, had he not done so, could not possibly have set a higher value on the land.
- (b) on the appeal:
 - (i) it was quite unrealistic to ignore the existence of the approved plan; and in the circumstances the value should be reduced;
 - (ii) (by Newbold, P., and Law, J.A.) the proper figure (including fifteen per cent. under s. 23 (2) of the Act) would be £6,900.

Appeal allowed with costs; £6,900 substituted for £13,800 in the judgment. Cross-appeal dismissed with costs.

Case referred to:

- (1) *E.A.R. & H. Administration (General Manager) v. Arusha Town Council*, [1966] E.A. 358.

July 5, 1968. The following considered judgments were read.

Judgment

Spry JA: This is an appeal from a judgment of the High Court of Kenya on a reference under s. 18 of the Land Acquisition Act 1894, of India, as applied to Kenya.

The matter began with a notification dated July 21, 1965, published in the *Gazette* on July 27, 1965, as G.N. No. 2728, under s. 6 of the Act, that approximately 9.25 acres of land being part of the land known as the Swamp Estate, L.R. No. 209/136/239, in the City of Nairobi was required for a public purpose, that is to say, a highway improvement scheme. A Collector was duly appointed and he made his award on November 30, 1965. The award does not form part of the record, but it appears that the Collector decided as a matter of law that part of the land in question, which had been shown as intended for roads on an approved sub-divisional plan, was of no value. He assessed the value of the balance of the land at £1,737. In case he was held wrong in his decision on the question of law, he made an alternative assessment of £7,845. He also awarded £50 for injurious affection and severance.

On December 22, 1965, the respondents, as the owners of the land, requested the Collector to refer the case to the High Court “for the determination of the question of valuation”. Two witnesses were called for the respondents and six for the Collector, who also gave evidence himself. Of these witnesses, five were valuers, Mr. Dunn for the respondents and Messrs. Naish, Wiggins, Walker and Levitan for the Collector, and each of them gave alternative assessments, according to whether or not the Collector was right on the question of law. As a matter of convenience, these alternatives have been referred to as basis “A”, that the Collector was correct, and basis “B”, that he was incorrect. After hearing the evidence and argument, the learned judge held that the correct basis was that referred to as “B” and he held that the value of the land at the material date was £12,000, which, increased by fifteen per cent. under s. 23 (2) of the Act, made a total award of £13,800.

Against this decision, the Collector has appealed, the appeal being limited to the decision to apply basis “B”. The respondents have cross-appealed, however, putting the valuation itself once more in issue.

It may, I think, be convenient to deal first with the cross-appeal. This, as I have said, challenges the learned judge's valuation of the land. The judge began by deciding that he could not use the comparative method of valuation, because there was so little material available to form a reliable comparison. With respect,

I think he was correct, although, of course, any dealing in comparable land has some evidential value. He then decided that he could not use the rating valuation roll which had been prepared in 1959, because there was evidence before him that land values had been at a peak in 1959, whereas in 1965 the market was depressed.

The learned judge then looked at the expert evidence and remarked that Dunn's figure was so vastly different from those of the other valuers that no reconciliation between them was possible. It appears actually to be higher than the 1959 rating valuation and the judge accepted the evidence that values had fallen considerably, particularly for undeveloped land. He therefore rejected Dunn's valuation and in my opinion he was justified in so doing.

Of the other four valuers, the learned judge observed that the figures given by two who held official positions (Naish, £5,714 and Wiggins, £5,936) were comparatively close, as were those of the other two who were in private practice (Walker, £10,000 and Levitan £12,500), although there was a large gap between the two pairs of figures. He rejected the figures given by the two official valuers, remarking:

"The differences may represent differences of attitude. I think I can regard the two outsiders as more impartial than the other two."

With respect, I think this is a serious misdirection. Whatever the true value of the land may be, I can find nothing in the record that would justify any suggestion of partiality and I am sure the learned judge did not mean to imply it, and I cannot accept as a general principle that professional officers who hold official appointments are on that account less likely to be impartial than those in private practice.

Of the remaining two the learned judge decided to adopt the valuation made by Levitan, subject only to a minor adjustment. In doing so, he noted that Levitan's method had been similar to that of the other valuers except Walker, but his result was not greatly different from Walker's, while Walker himself had said that he would not quarrel with it, although he thought it too high.

The decision to adopt Levitan's valuation was criticised by Mr. Nazareth with, I think, some justification. The judge, finding that he had nothing to rely on, except the opinions of the expert witnesses, appears to have decided that he had to adopt the opinion of one of them, and he chose Levitan. I would respectfully agree that there was, for all practical purposes, no other material available, but it was the duty of the learned judge to examine the facts in the light of the arguments put forward by the various experts and make his own assessment of the value; it was not, in my opinion, sufficient merely to accept what he thought the fairest of the valuations.

On the main issue of the value of the land, as opposed to the method adopted, Mr. Nazareth attacked Levitan's valuation on general lines, submitting that it reflected an unduly pessimistic approach, but he concentrated his main argument on a submission that a strip of land along the north side of Grogan Road and west of a plot numbered 12, to which Levitan gave only amenity value, should have been valued as suitable for development.

As regards the general criticism of Levitan's valuation, I would begin by remarking that all four of the Collector's witnesses expressed the opinion, which the learned judge accepted, that at the relevant date, that is July 27, 1965, the market for undeveloped land was very depressed. What we are concerned with is the market value, which is the price that would be agreed between a willing vendor and a willing purchaser, and that is an artificial concept when, in fact, no transactions are taking place. Moreover, the depressed market means that a person who bought the land in its undeveloped state, intending to re-sell individual plots after sub-division, would have to allow for having some plots on his

hands for a considerable time. Wiggins and Naish both thought that a developer could not reasonably expect to sell more than one plot a year, while Walker thought that the land as a whole would only interest a long-term speculator.

I would add that there was some evidence that at the material date there were indications that the market was beginning to improve, and while we are concerned with the value of the land at a particular moment, the current trend is a factor which would influence a speculative buyer.

The record does not contain any very clear description of the land, but we do know that the Nairobi river runs through it and that, at least in places, there is a considerable depth of black cotton soil. All four of the Collector's witnesses thought that the land north of the river should be regarded as unsuitable for development largely because it would be difficult to afford access, and an inspection of the exhibits shows that that was the opinion of the people who prepared at least two of the subdivisional plans. Wiggins and Naish gave this land an amenity value of £100 per acre; Walker suggested Shs. 10/- per square foot, which amounts to a little over £200 and Levitan valued it at £250 per acre.

These figures apply also to most of the land south of the river but north of Grogan Road. An exception is plot 12, of which just over half was acquired. This was generally regarded as an undesirable plot, partly on account of its situation and partly because of the depth there of black cotton soil. Wiggins was not prepared to give it more than the amenity value; Walker gave it a value of Shs. 1/25 per square foot and Naish, apparently rather reluctantly, valued it at Shs. 3/- Levitan, on the other hand, thought the whole of the plot should be acquired at Shs. 5/- per square foot. Walker was prepared also to place a value of Shs. 1/25 on the strip of land along Grogan Road, west of plot 12, to an equal depth, but Wiggins, Naish and Levitan thought this should have an amenity value only. It was on this strip that Mr. Nazareth concentrated his main argument, although he did not rely on Walker's opinion, possibly because he thought even Walker's valuation of this land too low.

There remains the land south of Grogan Road, part of which fronts on Victoria Street and which all the valuers thought would have been the most valuable part of the land acquired but for its designation as land for roads. So far as this could be divided into plots fronting on Victoria Street, both Naish and Levitan would assess it at Shs. 7/- per square foot and Wiggins at Shs. 5/-. (These prices are higher than the only sales of comparable plots around this time.) After allowing for expenses, profit and deferment, they arrived at figures of about £6,000, £7,827, and £5,160 respectively. Walker, on the other hand, was not prepared to assess this land otherwise than as a whole, on a speculative basis, at £4,737.

It is interesting to note that when the figures are broken down in this way, the pairing of Wiggins and Naish, on the one hand, and Levitan and Walker, on the other, no longer appears to present a true picture. If the strip of land west of plot 12 is ignored, the valuations of Wiggins and Walker are reasonably close, that of Naish is somewhat higher and that of Levitan considerably higher. It is in this connection that the misdirection regarding the evidence of Wiggins and Naish is significant, because if the learned judge had not disregarded their evidence, it might have affected his approach to the evidence of Walker and Levitan.

After reading the evidence, I am left in no doubt that while eventually much of this land may possibly be developed, it was not, at the relevant date, attractive to any potential developer and while much of it could probably be built on, if permission could be obtained, it would be expensive to do so and permission would not have been likely to be forthcoming. In particular, in spite of Mr. Nazareth's arguments, and with the greatest respect, I cannot think that the land west of plot 12 was of any

substantial value and I think it is significant that

although this land is at the junction of Victoria Street, Grogan Road and Fort Hall Road, there never appears, at any time in the past, to have been any suggestion that it was suitable for development.

I am forced, therefore, to the conclusion that if the learned judge had not misdirected himself, he could not possibly have set a higher value on the land than that given it by Levitan and might, very likely, have fixed one substantially lower. For this reason, the cross-appeal must, in my opinion, fail.

I turn now to the appeal itself. There were two grounds of appeal: the first that the learned judge had erred in holding that land shown on a sub-divisional plan, approved by the Commissioner of Lands under the Town Planning Act, as to be given up for roads had a commercial value and the second, that the judge ought to have held that the existence of the plan was a material factor in assessing the value of the land. At the hearing, Mr. Clarke, who appeared for the Collector, did not seriously pursue the first ground but relied almost entirely on the second. This amounts to a submission that the truth lies somewhere between basis "A" and basis "B".

In his judgment, the learned judge held that the plan should be ignored, because it was open to the respondent to submit a revised plan and, although two officers of the City Council had said they would not recommend any change, it was impossible to say that the City Council and the Commissioner of Lands might not accept some other scheme of sub-division.

Mr. Clarke conceded that an alternative plan might have been accepted but he submitted that the learned judge was wrong to disregard the plan on this account. Its existence was a fact which no potential purchaser would dare to ignore.

In this connection, Mr. Clarke cited the decision of this Court in *E.A.R. & H. Administration (General Manager) v. Arusha Town Council*, [1966] E.A. 358, and argued that the principle involved is the same. Mr. Nazareth sought to distinguish that case on the ground that it concerned a proposed town planning scheme and he argued that a scheme put forward by a public authority would operate on the mind of a purchaser in the way that a private sub-divisional scheme would not.

Mr. Clarke submitted that what the court ought to have done was to assess the likelihood of an alternative plan being accepted if it materially varied the proposed road alignments. On this question, the only evidence was that any such suggestion would not be recommended. Moreover, various plans prepared over the years had shown roads in more or less the same positions and they fitted in with the general road system of the City. If there was no chance that a change would be allowed, the Collector would have been right in his decision (although for a different reason) but Mr. Clarke was prepared to concede that a speculator would always give something, however small, on the chance of a change being approved. If there was a slight chance, then a small percentage should be added to the valuation and Mr. Clarke suggested that either the Collector's figure or that of Levitan, which the judge had preferred, on the basis "A" should be adopted, with perhaps five per cent. added for the speculative element. As I have said, the appeal did not attack Levitan's valuation and even on the cross-appeal Mr. Clarke did not ask that it should be rejected: all that he asked was that it should be revised to make allowance for the existence of the sub-divisional plan.

On this issue, I have no hesitation in agreeing with Mr. Clarke. I think it would be quite unrealistic to ignore the existence of an approved plan: indeed, I think that anything which might influence a potential purchaser must be relevant when determining the market value of land. On a point of detail, however, I think the correct approach should be to write down the value of the land shown as roads, not to write up the value of the balance.

Both parties expressed their agreement with this court making its own assessment, if we felt able to do so, and for my part I cannot see that any useful purpose would be served by remitting the case to the High Court.

Speaking generally, when land is acquired that is the subject of a sub-divisional scheme, it may, I think, be valued in either of two ways and I think the owner is entitled to the benefit of whichever approach would yield the higher figure. The first is to regard the land as subdivided. Generally speaking, the effect of a sub-divisional scheme is to enhance the value of plots that are designated for development, at the expense of any land set aside for roads and open spaces. In the present case, this approach would mean that the land shown as intended for roads would have no more than a nominal value. The other approach is to consider the value of the land as part of an undivided whole, but then, I think, as Mr. Clarke submitted, one must assess the chances of the appropriate authorities agreeing to a change in the scheme of sub-division.

Having regard to the facts, first, that the proposed road alignments have appeared more or less unchanged in all sub-divisional plans over a number of years, and, secondly, that the Fort Hall Road is a major traffic artery and the land with which we are concerned is at its junction with two other roads, I think any prospective purchaser would have thought that approval of any radical change was so unlikely as not to warrant serious consideration. There was, however, the possibility of some modification, and this might have brought into existence an extra plot or two. It is impossible to devise any formula to meet such situations and all that one can do is to make the best estimate one can on the facts of each case. In the present case, I do not think anyone would have bought the land except as a speculation and I do not think even a speculative buyer, having in mind the sub-divisional plan in relation to the system of roads in the City as a whole, would have paid more than ten per cent. of the notional value of the land if these factors had not existed. In this connection, I notice that Levitan, in addition to his valuations on the "A" and "B" basis, gave an intermediate figure of £4,400 for the land if it were sold with a restriction that the areas shown as roads constituted road reserves: this is, in effect, depreciating those areas by eighty-five per cent.

In my opinion, therefore, Levitan's figure for the road areas of £9,000 should be reduced to £900, which, added to the uncontested figure of £3,000 for the remainder of the land, would give a figure of £3,900, to which has to be added the statutory fifteen per cent., giving a total of £4,485.

I would accordingly allow the appeal and set aside that part of the judgment that awards a sum of £13,800 to the respondents and substitute the sum of £4,485. I would dismiss the cross-appeal.

Sir Charles Newbold P: The facts relating to this appeal are set out in the judgment of Spry, J.A., which, together with that of Law, J.A., I have had the advantage of reading in draft, and I consider it unnecessary to restate them. I agree with both Spry, J.A., and Law, J.A., that the cross-appeal should be dismissed and I do not consider that I can usefully add anything on that matter.

As far as the appeal itself is concerned, it was argued on the basis of the acceptance of the valuation of Mr. Levitan, which valuation was in turn accepted by the trial judge. There was no suggestion of re-examining the evidence on the valuation of the land, thus I do not consider it proper that this court should seek to re-examine the correctness or otherwise of the valuation and come to its own independent valuation. The accepted figures are £3,000, if part of the land acquired had no value by reason of the existence of an approved sub-divisional plan, and £12,000 if that part were given its full market value disregarding entirely the existence of such plan. The first value was arrived at on what was called

basis “A” and the second on basis “B”. The appellant submits that the trial judge erred in holding that the approved sub-divisional plan had no effect upon the value of the land acquired and submits that though the part of the land covered by the plan must have some value, the existence of this plan must have had a considerable effect on its value. The appellant submits, therefore, that this court should increase the valuation made on basis “A” to such an amount as it considered proper having regard to the existence of the plan. Like Spry, J.A., I consider that the proper approach would be to reduce the value arrived at on basis “B” rather than to increase the value arrived at on basis “A” as it is only on basis “B” that the value of the land covered by the plan is considered.

I have no doubt whatsoever that the existence of this approved sub-divisional plan would have had an effect upon the value of the land and that effect, in my view, must have been appreciable. I cannot envisage a position in which a potential purchaser of the land would not have considered the plan as considerably reducing the value of the land set aside for road reserves. It was urged that the existence of this plan and the evidence that it was unlikely to be modified would have had such a great effect that it would leave very little value to the land set aside for road reserves. It was also urged that it was not open to an owner to withdraw an approved sub-divisional scheme and we were referred to what purports to be by-law 363 of the Nairobi Municipality (Building) By-Laws 1948. For this purpose a book was handed up which purported to be these By-laws, made under ss. 49 and 69 of the Local Government (Municipalities) Ordinance 1928. This book purports to have been printed by W. Boyd & Co. (Printers) Ltd., not, be it noted, by the Government Printer. In the absence of any argument on the matter, I am by no means satisfied, having regard to the very many changes which have taken place in the legislation dealing with municipalities since the enactment of the Local Government (Municipalities) Ordinance 1928, that any by-laws made under that Ordinance are still in force. In any event, under s. 27 of the Interpretation and General Provisions Act (Cap. 2), subsidiary legislation, which would include by-laws, shall, unless otherwise expressly provided in any written law, be published in the *Kenya Gazette*. Save where it is otherwise so expressly provided, unless subsidiary legislation is so published then it is of no effect. I am unaware of any such express provision in relation to the by-laws in question. I understand that it is virtually impossible to obtain copies of the by-laws, assuming that they exist. I consider it quite wrong that in such a magnificent and well-built city as Nairobi it is virtually impossible for the citizens of that city to obtain copies of the building by-laws (assuming they exist) which govern them in relation to the use of their land within the city. Such a position should not be tolerated for one moment. It is quite obvious that the whole object of s. 27 of the Interpretation and General Provisions Act would be defeated unless the voluminous subsidiary legislation which is the hall-mark of modern society was available to the persons whose daily life it intimately affects. As these by-laws, assuming they exist, have not been proved to have been so published they have no effect. Accordingly, in coming to a conclusion as to the effect on the value of this land of the approved sub-divisional plan, I pay no regard whatsoever to any alleged provision that any such plan, once approved, cannot be withdrawn.

While, as I say, the existence of an approved sub-divisional plan must have a considerable effect upon the value of the land, nevertheless there is always the very real possibility that the land could be dealt with in a way different from that plan: or that the plan, though retained in its essentials, might be altered sufficiently to make a considerable difference to the value of the land which was acquired. Any assessment of the amount by which the normal market value of the land set aside for road reserves would be reduced by the existence of this plan must, of course, to a large extent be arbitrary and a matter of first impression,

and, therefore, capable of considerable variation between different valuers and, indeed, between different judges. Giving the best consideration I can to the matter, I think the effect would have been to reduce the value of £12,000 accepted by the judge on basis “B” by fifty per cent. In the result I would reduce the amount awarded by the trial judge from £12,000 to £6,000 to which figure would have to be added the fifteen per cent provided for under s. 23 (2) of the Land Acquisition Act, making a total of £6,900. I would, therefore, vary the judgment accordingly and substitute for the judge’s figure of £13,800 a figure of £6,900. I would not interfere with the judge’s award on costs save to make a similar substitution of the figure of £6,900 for his figure of £13,800. As the appellant has succeeded on the appeal I would allow him the costs of the appeal.

For these reasons I would allow the appeal, with costs, and substitute for the figure of £13,800 in the judgment a figure of £6,900. I would dismiss the cross-appeal with costs. As LAW, J.A., is of the same view, it is so ordered.

Law JA: I have had the advantage of reading in draft the judgments prepared by Spry, J.A., and by Sir Charles Newbold, P. I agree with them that the appeal must be allowed. With great respect to the learned trial judge, I cannot agree with his view that the existence of an approved sub-divisional plan affecting the land acquired is not a material factor in assessing the value of that land. Clearly a potential purchaser of the land could not ignore the fact that some of the land had been reserved for roads, and I can see no difference in principle between a draft town planning scheme and an approved sub-divisional plan in this respect: in either case the potential purchaser would be aware of the existence of a restriction on the user of the land, or part of it. Such restriction might, or might not, be capable of removal by the withdrawal of the sub-divisional plan or the alteration of the draft town planning scheme, but so long as the restriction is in existence, as it was in this case, it must be a factor to be taken into consideration in assessing the market value of the land in question.

As regards the cross-appeal, it complains that the learned judge erred in accepting Mr. Levitan’s valuation and that he awarded a sum which was unrealistically low. It is true that the reason given by the judge for preferring Mr. Levitan’s valuation is open to criticism. He seemed to imply that he had to “pick and choose” from the valuations put forward by the five experts, selecting one and rejecting the others. But I do not think that in doing so he failed to consider the question independently, so as to form his own assessment of the value of the land. The learned judge referred to the fall in land values since the last municipal valuation roll in 1959. He had heard the detailed evidence of the five experts. I have no doubt that he did in fact arrive at an independent valuation, and that he adopted Mr. Levitan’s valuation because it represented in his opinion the most accurate estimate of the market value of the land, and not for any capricious reason. I see no reason to differ from the learned judge’s award of £12,000. As to the amount by which this figure is to be reduced by reason of the restrictions imposed by the sub-divisional plan, this must to a large extent be a matter of guesswork, and I propose to adopt the figure of fifty per cent. suggested by the learned President which would reduce the award to £6,000, which together with the statutory increase of fifteen per cent. makes a total of £6,900. I agree that the cross-appeal fails, and I concur in the order proposed by Sir Charles Newbold, P.

Appeal allowed and judgment of court below varied. Cross-appeal dismissed.

For the appellant:

PA Clarke

For the respondents:

JM Nazareth, QC and SM Amin

Shaikh Mohammed Amin, Nairobi

Mlay v Phoneas
[1968] 1 EA 563 (HCT)

Division:	High Court of Tanzania at Arusha
Date of judgment:	28 October 1967
Case Number:	16/1966 (98/68)
Before:	Platt J
Sourced by:	LawAfrica

[1] Contract – Implied term – Subsequent unforeseen events – Whether term to be implied.

[2] Contract – Void contract – Agreement for sale of land rendered inoperative and void by Freehold Titles (Conversion) and Government Leases Act, ss. 19 and 20 (T.) – Whether deposit paid by purchaser refundable – Law of Contract Ordinance, s. 65 (T.).

[3] Land Control – Recovery of deposit paid on void contract – Assignment without consent of Commissioner – Whether agreement avoided or only “disposition” – Effect on collateral terms – Whether deposit recoverable – Law of Contract Ordinance, s. 65; Freehold Titles (Conversion) and Government Leases Act, ss. 19 and 20 (T.).

[4] Sale of Land – Deposit – Agreement for sale avoided for lack of consent – Whether deposit and expenses of purchaser while in possession recoverable – Freehold Titles (Conversion) and Government Leases Act, ss. 19 and 20; Law of Contract Ordinance, s. 65 (T.).

Editor’s Summary

The plaintiff agreed to purchase two farms under a written agreement dated October 30, 1964. These farms were held by the defendant under a Government lease, the land having been converted from freehold property by the Freehold Titles (Conversion) and Government Leases Act. The plaintiff agreed to deposit, and did deposit, a sum of Shs. 10,000/- on signing the agreement, and the plaintiff went into possession of the farms on October 30, 1964. The agreement provided that the defendant could re-sell the land if the plaintiff failed to pay the balance of the purchase price and that the defendant would repay the plaintiff the deposit and refund the plaintiff’s expenses of running the farms while in possession in the event of the defendant exercising this right of re-sale. The agreement did not, however, provide for what was to happen if the plaintiff had to return the farms to the defendant, which was what in fact did happen. The farms were returned to the defendant on March 31, 1965, and the plaintiff then claimed back his deposit and his expenses of running the farms. He based his claim on the agreement or on an implied term in it; or in the alternative upon the fact that the agreement had become void for lack of consent from the Commissioner under ss. 19 and 20 of the Freehold Titles (Conversion) and Government Leases Act

and argued that in those circumstances the deposit and expenses were refundable under s. 65 of the Law of Contract Ordinance as advantages received by the defendant under a void contract. The defendant raised a preliminary objection that the plaint disclosed no cause of action.

Held –

- (i) on the agreement as it stood the plaintiff could not recover his deposit and expenses; and there was no ground for implying any term to allow him to do so;
- (ii) the agreement for sale was a “disposition” within s. 19 of the Freehold Titles (Conversion) and Government Leases Act, there being no distinction for this purpose between an agreement and the conveyance;

- (iii) the terms in the agreement concerning the disposition itself were inoperative, but terms collateral to it remained operative and could be enforced (dicta in *Patterson and Others v. Kanji* (1) applied; *Patel v. Lawrenson* (2) discussed);
- (iv) the deposit and expenses were recoverable under s. 65 of the Law of Contract Ordinance;
- (v) therefore a cause of action was disclosed in the plaint.

Preliminary objection overruled.

Cases referred to in judgment:

- (1) *Patterson and Others v. Kanji* (1956), 23 E.A.C.A. 106.
- (2) *Patel v. Lawrenson and Matzen*, [1957] E.A. 249.
- (3) *Fazal Kassam (Mills) v. Abdul Nagji Kassam*, [1960] E.A. 1042.
- (4) *Guaranty Co. of East Africa, Ltd. v. Shah*, [1959] E.A. 300.

Judgment

Platt J: This is a preliminary point raised by the defendant on the grounds that the plaint discloses no cause of action. The matter was not pleaded in the defence but it is conceded that if the plaint discloses no cause of action, the court itself is bound to strike out the plaint under O. 7, r. 1, of the Civil Procedure Code. I proceed then to examine the arguments addressed to me.

Judging from the plaint the facts are that on October 30, 1964, the plaintiff agreed to purchase and the defendant agreed to sell two farms held by the defendant under a Government lease, the land having been converted from freehold property to a Government lease by virtue of the Freehold Titles (Conversion) and Government Leases Act (Cap. 523). The situation between the parties was curious in that although the plaintiff agreed to deposit the sum of Shs. 10,000/-, and did so on the signing of the agreement on October 30, 1964, nevertheless the plaintiff was not in a position to pay the balance of the purchase price, namely, Shs. 490,000/-, without raising a loan from the Agricultural Credit Agency or elsewhere. Paragraph 3 of the agreement is as follows:

“The purchaser undertakes to obtain a loan from the Agricultural Credit Agency or elsewhere for the balance of the purchase price by January 31, 1965, should no such loan be obtained by that date then the vendor agrees to permit the purchaser until March 31, 1965, to complete the sale or to negotiate a further agreement for sale.”

It was therefore contemplated by the parties that the plaintiff might not be able to complete his contract and provision was made for the right of the defendant to re-sell his interest in the land should he obtain a firm buyer. His right of sale was added as para. 4 (a) of the agreement by a written contract supplementary to the main contract executed on the same day, October 30, 1964. In the event of a re-sale by the defendant by virtue of the provisions of para. 4 of the agreement, the parties agreed that the defendant should repay the deposit together with a sum to be agreed with regard to the running expenses of the farms incurred by the purchaser up to the date he vacated the farms due to the sale by the defendant to another purchaser. However, in the event of the plaintiff managing to complete the sale then upon payment of the full price the vendor undertook to transfer the property to the plaintiff.

It appears that the plaintiff went into possession of the farms on the date of the agreement, but failed to pay the price by January 31, 1965, and it was agreed in accordance with para. 3 of the agreement that he should continue in possession until March 31, 1965. However, on that date he was still unable to complete his

part of the agreement, and as para. 7 of the plaint shows he was obliged to return the farms to the defendant. Now I should say here that up to January 31, 1965, by virtue of para. 6 of the agreement, the defendant, though not in possession, nevertheless was to be permitted the control of the management of the estate and its management policy with regard to spraying and the application of fertilizers in accordance with the accepted practice of the management of coffee estates as laid down by the Coffee Research Station at Lyamungu. Arising out of the failure of the plaintiff to complete he stood to lose his deposit and his expenditure in running the estate; but, as I have shown, the parties only set their hands to an agreement in writing providing for the repayment of the deposit and expenses in the event of the defendant re-selling the land. The plaintiff claimed in the first ten paragraphs of his plaint the right to recover back his deposit and expenses in running the estate on the basis of the agreement between the parties. Paragraph 10 of the plaint is as follows:

“It was understood between the parties that in the event of the plaintiff being unable to complete the purchase because of want of money or any other reason the deposit of Shs. 10,000/- would be returned or refunded to the plaintiff by the defendant and that the plaintiff would also be paid by the defendant all expenses the plaintiff might incur in running the farms during the plaintiff’s possession.”

In the alternative he claimed that the agreement was void under s. 19 of the Freehold Titles (Conversion) and Government Leases Act of 1963 (Cap. 523 of 1963) and therefore, claimed the refund of the deposit and expenses as being advantages received by the defendant. Paragraph 12 is as follows:

“The said agreement being or becoming void as aforesaid the defendant is bound to return the deposit of Shs. 10,000/- and further restore the advantages received by the defendant as hereinbefore specified under the said agreement or to make compensation for them to the plaintiff.”

In para. 13, the plaintiff claimed that his total expenditure of Shs. 23,116/35 amounted to benefits or advantages received by the defendant.

On the first part of the plaint, namely the claim based on the contract, the defendant argued, quite rightly, in my view, that para. 10 did not allege an agreement at all. Whatever was “understood” as far as the intention of the parties went, they had not set down their agreement in writing except in para. 4 of the plaint which envisaged circumstances which had not arisen and were not pleaded. Therefore, as matters of intention, this did not give the plaintiff any right of action against the defendant. The defendant then took the point that possibly para. 10 was meant to refer to an implied term in the contract. The situation was that the parties were obviously aware that the agreement might not be fulfilled and they had provided certain provisions to cover that event. They had apparently not come to any agreement which they were able to set out in writing concerning the contingency which eventually materialised. In these circumstances, it seems clear to me that it cannot be said that the parties must have agreed at the time of making the agreement that the deposit and the expenses were to be repaid by the plaintiff. On the other hand, if it is suggested that by dint of subsequent events such a term in the contract was to be implied such a suggestion must fail. I agree with the defendant, therefore, that on the agreement as it stands, the plaintiff could not recover his deposit or expenses and that there is no ground for implying any such term to allow him to do so.

The main argument centres upon the alternative claim that whatever the parties agreed their agreement was rendered inoperative by virtue of s. 19 of the Freehold Titles (Conversion) and Government Leases Act, the material provisions of which are as follows:

- “19. – (1) A disposition of a Government lease shall not be operative without the consent of the Commissioner.
- (2) In this section, ‘a disposition’ means-
- (a) an assignment, sub-lease, mortgage or settlement of the term whether in the whole leased land or a part thereof, . . .”

The remainder of the section is not applicable to this case. It was argued by the defendant that this agreement was not covered by s. 19. But, of course, where a person holds land on a term of years when he disposes of his whole interest therein, such a disposition is called an assignment (see Williams and Eastwood on Real Property (24th Edn.), p. 112). The plaintiff’s argument is clearly right that the agreement in the present case was for an assignment of the whole of the defendant’s interest in his Government leasehold. It would not be logical to make any distinction between an agreement for this purpose and the conveyance. The Act clearly intends to make any disposition inoperative by way of assignment. The more important question concerns the meaning of the words “shall not be operative without the consent of the Commissioner”. The defendant submitted that they meant that the disposition was voidable, and that s. 20 of the Act controls s. 19. Section 20 is as follows:

“Where the Commissioner fails to give his consent to any disposition to which s. 19 applies within six months after it is sought, or refuses his consent, the transaction shall become void.”

The defendant argues that if the Commissioner should fail to consent after his consent has been sought or refuses to give his consent, the whole transaction then becoming void must mean that there is a difference between the situation when the transaction becomes void than when it was merely inoperative before his consent was sought or refused. I think that may well be so. It is one of the cardinal differences in conveyancing here in comparison with English Law that the State in Tanzania reserves the right to control dispositions of property, while at the same time not wishing to prevent reasonable disposition of property. The result is that while the parties are bound to present to the Commissioner evidence of their intended disposition on which his consent can properly be exercised, the parties, nevertheless, are in the position of having an inoperative agreement pending his consent. It is not a contract which the State holds to be necessarily unconscionable or illegal, so that the doctrine of *par delictum* could apply. But the parties do find themselves in the position of being unable to enforce their contract, and further it would appear that not only is their agreement not enforceable, but that there is no subsisting contract as far as the disposition *simpliciter* is concerned. The contract may well exist however with regard to collateral matters. So for instance as both parties will know the position, they may well agree to some such compromise in their written agreement that a deposit may be paid and the purchaser may go into possession, but that if the contract fails to become operative by virtue of the lack or refusal of consent, the deposit and expenses incurred by the purchaser shall be refunded. Of course, it is unwise in general to go into possession or to pay monies which cannot easily be refunded. But that is another matter. In my opinion a distinction must be drawn between those terms of the agreement which concern the disposition and those which are collateral to it. So that while the former may be inoperative, the latter remain operative and can be enforced in the event of the Commissioner failing or refusing to give consent. Of course, if the Commissioner merely fails to give consent it may be that a new agreement can be drawn up and resubmitted to him.

I draw these conclusions from a comparison of the law relating to rights of occupancy as interpreted by the courts. I would refer to the remarks of the Court of Appeal in *Patterson and Others v. Kanji* (1956), 23 E.A.C.A. 106, a

case in which a lease was found to be inoperative because the consent of the Governor had not been obtained under reg. 3 of the Land Regulations 1948. The regulation provided that no transfer, mortgage, under-lease or bequest of a right of occupancy of or any interest therein nor any dealing therewith in any way whatsoever (other than by way of equitable mortgage by deposit of title deeds) shall be operative unless and until it is approved by the Governor. It was observed that the plaintiff/respondent had sought to enforce at law a claim against a third party which he could only establish by relying upon a transaction declared by law to be inoperative for lack of approval and that is exactly what he could not do. The judgment continues:

“Nor do I think that the respondent can get any assistance from the variation in the wording of the 1926 and 1948 Regulations. It is not disputed that the main reason for the change was the practical difficulty of getting the Governor’s approval before the transaction was put through. How far the present regulation nullifies a dealing which is not subsequently approved may be a matter for argument: such a transaction may still be valid for some purposes, e.g. if there are collateral undertakings. But, at least it is clear that without approval no dealing can operate to effect a sale or mortgage or to create a charge or a sublease.”

With respect I agree with these views, and although the suggestion that collateral agreements still subsist may only be obiter, I adopt it as representing the law. I was referred to *Patel v. Lawrenson and Matzen*, [1957] E.A. 249, as also illustrating that the word “inoperative” has the effect of meaning that the disposition is void. That was also a case concerning a right of occupancy, and depended on the interpretation of reg. 3 to which I have already referred. The seller re-sold the property held under a right of occupancy before the purchaser had completed the agreement by making full payment of the price and also before the Governor’s consent had been obtained. There was a clause in the agreement providing for the repayment of the £100 paid by the purchaser as a deposit in the event of consent being refused, consent in fact having never been applied for. There were also other terms as to the date by which payment was to be made and there was argument that time was not of the essence of the contract. Nevertheless, the disposition was held to be invalid. Whether time was or was not of the essence was immaterial, and therefore whether or not the buyer or the seller were in breach of the agreement, the whole contract with regard to the disposition of the property was invalid. Therefore the seller was entitled to re-sell the property. Lowe, J. (as he then was), summed up the situation as follows:

“I have considered whether or not there is any substance in the contention of counsel for the appellant that the intention of that regulation is to restrict any dealing with the land and that it does not make a contract inoperative in other respects. The regulation does not say that and its effect seems to me to be abundantly clear. The intimately relevant part says “no dealing therewith in any way whatsoever” shall be operative. It is the dealing, whether by agreement, transfer or otherwise which is inoperative without approval, not a portion of the dealing or agreement or whatever it is. Nor does the regulation say that any such dealing shall not be operative to pass merely the title to or any interest in any land held under a right of occupancy, unless it is approved. I am satisfied the whole agreement is inoperative because of a lack of approval and that being so this court is precluded from enforcing any part of the agreement. It is wrong to suppose that any position in which the appellant finds himself could be remedied by an order for specific performance up to the stage of the first respondent executing a transfer of the right of occupancy to see whether or not approval could now be obtained. That, in effect, would be for this court to defy the law by

ordering another dealing, without approval, in pursuance of an agreement which itself is inoperative. So it is regarding the submission that time was not of the essence of the contract. It does not matter one way or the other because the agreement cannot operate to make time all important or of no import. In other words, the terms of the agreement are of no effect until the Governor has approved the agreement.”

It is of interest to note that although the learned judge talked of the whole agreement being unenforceable, nevertheless, the agreement concerning the refund of the deposit was not objected to, and in fact that was paid. No issue arose on that score on appeal and it seems, therefore, that in considering the whole agreement the learned judge was referring to the terms of the agreement pertaining to the disposition.

I was further referred to *Fazal Kassam (Mills) v. Abdul Nagji Kassam*, [1960] E.A. 1042, where it was again held that agreement without consent was ineffectual in law and therefore null and void ab initio.

These authorities all illustrate the meaning of the word “inoperative” in relation to rights of occupancy and they were the background against which the Freehold Titles (Conversion) and Government Leases Act was enacted. It seems to me that there can be little doubt that, in the conversion of freehold to a type of tenure more greatly approximating rights of occupancy, the legislature must have had in mind the meaning ascribed to “inoperative” that had been given to the word by the authorities dealing with rights of occupancy. I should also notice that Land Regulation 3 was altered in 1960, providing wider terms than those which were before the court in *Patel v. Lawrenson*, without, however affecting the substance of that judgment. I take it then, that the meaning of “inoperative”, is not “voidable”, as the defendant argued in the instant case, but that, in so far as the agreement concerns the disposition of the Government leasehold property, it is “void”; but may still be of some effect as far as collateral agreements.

Applying these principles to the instant case, it would follow then that the agreement in para. 4, would not be void but did not in fact come into operation. There was no other collateral agreement. The fact that the plaintiff did not complete his contract is not material, for that part of the agreement concerned the disposition. As no consent had been asked for, s. 20 did not come into operation. Therefore, for the purposes of this case the whole transaction was not void. But the disposition was void.

If that is so, then the question is whether the plaintiff has any redress by way of recovering his deposit and expenses. It would appear that the main purpose of paras. 11, 12 and 13 of the plaint was to invoke the provisions of s. 65 of the Law of Contract Ordinance Cap. 433. That section provides as follows:

“When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”

The proviso that follows is not relevant to this case. The question is whether it can be said that this agreement has been “discovered to be void”. Once again I am thrown back on the commentaries of the learned authors on the Indian Contract Act, in which s. 65 was identically enacted. It would appear that the courts had some difficulty in construing this section. There was difference of opinion whether the section should be limited to agreements which became void or should be held to cover agreements which were void ab initio. There was considerable difficulty in giving the agreement the wider view because then persons to an illegal contract might recover back their money. However that

might be, and indeed there would be good ground for construing s. 65 as not entitling parties to an illegal contract from regaining such payments (see *Guaranty Co. of East Africa, Ltd. v. Shah*, [1959] E.A. 300), no difficulty arises in this case since there is nothing illegal about an agreement for the sale of the land in general. It is merely void as to disposition and may have the force of law, when consent is given. Without authority on the point, so far as I am aware, and certainly the excellent researches of counsel in this case have not brought any to light, I would prefer the wider view of s. 65. It seems to me manifestly just that where the parties have altered their position with their full knowledge, that in the event of the disposition being held void or remaining inoperative, there should be redress. The purchaser who has deposited money has done so partly as an earnest of completing the contract which cannot be enforced. It has been received by the vendor who has thereby gained an advantage, which might accrue to him although he has taken no steps to gain the Commissioner's consent in order to pass a good title to the purchaser, as it is his duty to do. Thus while holding the purchaser to an unenforceable agreement he may well look for another purchaser who may be able to pay him a higher price. It would be unconscionable if the vendor in delaying the fulfilment of the contract should also be entitled to retain the deposit. Even if the vendor cannot be said to have acted improperly, it is hardly a case where because of default on the part of the purchaser that he should be allowed to keep the deposit. Counsel for the defendant argued that the deposit was not repayable, relying on s. 64 of the Law of Contract Ordinance, under which it has been provided that where the vendor rescinds the contract, thus avoiding it, he shall not be entitled to retain a benefit under the contract. But it was said that as the deposit was a collateral matter to the contract, it was not a benefit derived under it. That may be, but s. 64 has no application to the present case. Looking at the Commentary of Pollock and Mulla to s. 65, in their treatise *Indian Contract and Specific Relief Acts* (8th Edn.) to which I was referred, the following comment appears in the discussion concerning agreements discovered to be void:

“A transferee of property which from its very nature is inalienable is entitled to recover back his purchase money from the transferor, if the transfer is declared illegal and void.”

It would appear therefore that, as at present no right in property can be alienated without prior consent, the deposit which is not only an earnest but is also part of the purchase price should be recoverable.

There is then the question as to whether the expenses incurred in running the estates are also recoverable. If they amounted to an advantage, I see no reason in principle why they should not be recoverable for the same reasons as a deposit is recovered. It is a question of evidence as to whether the expenses amounted to an advantage. They might not; but so much of the expenses as amounted to an advantage should be recoverable under s. 65. I would observe here that by making a collateral agreement, the parties may very well preserve a greater degree of reimbursement than if they merely rely on s. 65. Be that as it may, the plaintiff in this case has a good cause of action in my opinion founded on s. 65 of the Law of Contract Ordinance.

I return then to the beginning of the discussion to examine whether the plaintiff has averred sufficient facts to ground a cause of action. In my opinion paras. 11, 12 and 13 sufficiently plead facts from which a suit under s. 65 can be brought. I conclude, therefore, that a cause of action has been disclosed and that the case should go forward to trial on the alternative prayers in the plaint. I would perhaps add that, in the particular circumstances of this case, this result would seem just because for at least three months from October 30, 1964, to January 31, 1965, while the plaintiff was in possession, the defendant directed the

control of the estate. The defendant must therefore have been well aware of the plaintiff's management at least during this time. But as I said whether this resulted in any advantage is a matter which will be determined at the trial.

Preliminary objection overruled.

For the plaintiff:

KD Oza

KD Oza, Moshi

For the defendant:

Zaffer Ali

Mustafa and Zaffer Ali, Moshi

Joshi v Uganda Sugar Factory Ltd [1968] 1 EA 570 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	11 July 1968
Case Number:	16/1968 (106/68)
Before:	Sir Clement De Lestang V-P, Spry and Law JJA
Sourced by:	LawAfrica
Appeal from:	High Court of Uganda – Saldanha, J

[1] *Civil Practice and Procedure – Particulars – Application for further and better particulars of defence – Plaintiff in running-down action alleging accident at particular time – Defence “not admitting” time – Whether particulars should be ordered of defence – Whether a failure to admit is the same as a denial – Civil Procedure Rules, O. 6, rr. 3, 3A, 7 and 9 (U.).*

[2] *Civil Practice and Procedure – Pleading – “Does not admit” – Whether equivalent to a denial.*

Editor's Summary

The plaintiff (appellant) in a running-down case alleged in his plaint that the accident in which he was injured by the defendant's (respondent's) tractor occurred “at about 7.45 p.m.”; and also alleged that the driver of the tractor was negligent in that, *inter alia*, he drove the tractor without effective lighting and failed to slow down or stop when his view ahead was obscured due to darkness. The defendant in his defence stated “the defendant does not admit that the collision occurred at 7.45 p.m. as alleged”; and went on to allege contributory negligence by the plaintiff but without any reference to lights. The plaintiff applied for further and better particulars of what time the defendant alleged that the accident

took place. The defendant refused to supply this, claiming amongst other things that his “non-admission” was not a denial and that it was for the plaintiff to prove his allegation without any amplification from the defendant. The plaintiff thereupon applied to the High Court for an order for further and better particulars. That application was dismissed and the plaintiff then brought this appeal.

Held –

- (i) a refusal to admit is for all practical purposes the same as a denial;
- (ii) (by De Lestang, V.-P., and Spry, J.A.; Law, J.A., dissenting) the refusal to admit did not amount to a positive averment; there was not likely to be any question of surprise; and the denial was not evasive; therefore particulars should not be ordered.

Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Weinberger v. Inglis*, [1916–17] All E.R. Rep. 843.
- (2) *Pinson v. Lloyds and National Provincial Foreign Bank, Ltd.*, [1941] 2 All E.R. 636.
- (3) *Chapple v. Electrical Trades Union*, [1961] 3 All E.R. 612.
- (4) *Hall v. London and North Western Railway Co.* (1877), 35 L.T. 848.
- (5) *Fox v. H. Wood (Harrow), Ltd.*, [1962] 3 All E.R. 1100.
- (6) *Thorp v. Holdsworth* (1876), 3 Ch.D. 637.

July 11, 1968. The following considered judgments were read:

Judgment

Spry JA: I have had the advantage of reading in draft the judgment of Law, J.A., in which are set out the facts giving rise to this appeal and I do not think it necessary to repeat them in full. Briefly, the position is that the appellant has averred that an accident took place at a particular time and place. The respondent company has admitted that the accident occurred and the place where it occurred but has refused to admit the time. The appellant claims to be entitled to further and better particulars, that is, he claims to be entitled to know at what time the respondent company alleges the accident took place. The High Court refused an order for particulars and the appellant now appeals to this court.

The appeal turns on four rules of the Civil Procedure Rules. These are rr. 3, 3A, 7 and 9 of O. VI. Rule 3 provides for the ordering of further and better particulars; r. 3A provides that an allegation of fact in any pleading if not specifically denied, is to be taken to be admitted; r. 7 provides that every allegation of fact must be dealt with specifically by a defendant; and r. 9 provides that a denial must not be evasive.

The general principle is, I think, set out in the judgment of Astbury, J., in *Weinberger v. Inglis*, when he said ([1916–17] All E.R. Rep. at p. 844):

“As a general rule, the court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to succeed, and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him.”

Looking at the matter on the simplest footing, the appellant has made certain allegations which he must prove to succeed. The respondent company has made his task somewhat easier by admitting certain of those allegations but the onus remains on the appellant to prove those that are not admitted.

The court will, however, order a defendant to furnish particulars where he is making positive averments and will also exercise its discretion to order particulars where it believes that by so doing it will narrow the issues and avoid surprise, and so reduce expense.

It has been suggested that in refusing to admit (which, I agree, is for all practical purposes the same as denying) that the accident occurred at 7.45 p.m., the respondent company is, in effect, asserting that it occurred at some other time, and that, since the plaint contains reference to a vehicle not having “any effective lighting” and to the view being obstructed by “darkness”, it may be assumed that what he is

asserting is that the accident occurred in day light.

I am not persuaded by that argument. Of course, in a sense, just as a coin has an obverse and a reverse, so every negative can be expressed as a positive, but the question, as I see it, is not whether a denial could have been expressed in a positive way, but whether the defendant's intention is merely to deny or to set

up a positive case in contradiction. A defendant is perfectly entitled, if he wishes, to adopt an entirely negative attitude, putting the plaintiff to proof of his allegations, and if he does so, the plaintiff cannot, by asking for particulars, compel him to make positive assertions. On the other hand, of course, when a defendant adopts a purely defensive attitude in his pleadings, he will not be allowed to conduct his case on a different footing, or at least only on terms (*Weinberger v. Inglis (supra)*; *Pinson v. Lloyds and National Provincial Foreign Bank, Ltd.*, [1941] 2 All E.R. 636).

Again, I cannot see that there is likely to be any question of surprise. The appellant has averred, and presumably believes he can prove, that the accident occurred at about 7.45 p.m. He has been given notice that that allegation will be challenged. If the allegation is material, and it would appear that both sides think it is, the appellant will call all the evidence he can to prove it. I cannot see that he is in any way handicapped in the preparation of his case. It is possible that there may be some extraordinary development at the trial, but the court has a discretion to allow rebutting evidence to meet any such situation, and for this purpose may, if necessary, grant an adjournment, making any appropriate order as to costs.

There remains the question whether the denial can be said to be evasive. At first sight, there might seem an analogy with the example given in r. 9. If it is averred that a defendant received a certain sum, it is evasive merely to deny the receipt of that sum. The defendant must either say what sum he received, or that he received nothing. On consideration, however, I do not think the analogy a good one. A denial by a defendant that he has received, say, £50, is, on the face of it, a denial of liability and it is obviously misleading to the plaintiff and to the court if he had in fact received £49. Here, however, the issue is one of negligence and that is clearly denied. The time when the accident occurred is not a primary issue. It may, or may not, be of importance in assessing the evidence of negligence. It is true that the appellant has referred to “darkness” in his plaint but only in the particulars, and a defendant is not required to plead to particulars (*Chapple v. Electrical Trades Union*, [1961] 3 All E.R. 612). In my opinion, the denial was not evasive.

For the reasons I have given, I think the learned judge was right in refusing to order particulars and I would dismiss the appeal, with costs.

Law JA: This is an appeal against the dismissal by the High Court of Uganda (Saldanha, J.) of an application for further and better particulars of a pleading. The appellant is the plaintiff in a pending civil suit in which he claims damages for personal injuries resulting from a collision between the motor-cycle ridden by him and a tractor and trailer driven by the servant or agent of the defendant company. By para. 5 of the plaint, it is alleged that the accident happened “on or about the 2nd day of February, 1965, at about 7.45 p.m., . . . on a road in Bukolongo Division of the defendants’ estate near Lugazi”. Amongst the particulars of negligence alleged against the defendant’s driver are that he:

- “(c) drove the said tractor or permitted them (sic) to be driven without any effective lighting;
- (g) failed to slow down or to stop when his view ahead was obstructed due to darkness.”

By para. 4 of the defence, the defendant admitted that the accident occurred on the day and at the place alleged in the plaint, but went on to plead “further, the defendant does not admit that the collision occurred at 7.45 p.m. as alleged”. By paras. 5 and 6 of the defence it is pleaded that the collision was caused solely, alternatively was contributed to, by the plaintiff’s own negligence, which is

particularized but without any reference to lights. The plaintiff's advocate wrote to the defendant's advocate in the following terms:

"I refer to the defence filed herein and I shall be obliged if you will let me have the following further and better particulars thereof:

Para. 4. The defendant denies that the accident took place at 7.45 p.m. I wish to know what time the defendant alleges that the accident took place."

To this letter the defendant's advocate replied as follows:

"It is the plaintiff's allegation that the collision occurred at 7.45 p.m. (para. 5 of the plaint). Para. 4 of the written statement of defence states, *inter alia*, that the defendant *does not admit* that the collision occurred at 7.45 p.m. as alleged. The statement in your letter that 'the defendant denies that the accident took place at 7.45 p.m.' is not correct. The plaintiff has made a certain allegation of fact, and it is open to the defendant to say no more than that the allegation is not admitted. In our opinion, it is for the plaintiff to prove his allegation and he cannot call upon the defendant to amplify the non-admission."

The plaintiff then applied to the High Court by notice of motion for an order that the defendant supply the further and better particulars asked for. In dismissing this application, Saldanha, J., said:

"The plaintiff's task has been facilitated by the defendant's admission of the collision and the date on which it occurred. That it occurred at 7.45 p.m. is not admitted and the plaintiff must therefore prove it, and the defendant is under no obligation to state the time at which he alleges the collision occurred."

From this decision the plaintiff now appeals. Mr. Hunt for the plaintiff/appellant has made a number of submissions. The first is that there is no difference between a refusal to admit an allegation, and a denial thereof, and he relies on a dictum to this effect by Grove, J., in *Hall v. London and North-Western Railway Co.* (1877), 35 L.T. 848. Secondly, Mr. Hunt submits that, reading the pleadings as a whole, time is a material factor in this case. The plaintiff has claimed that the accident occurred in the hours of darkness, and that it was caused *inter alia* by reason of defective lighting on the defendant's vehicle. By admitting the date and place of the accident, but denying that it occurred at 7.45 p.m. when it was dark, the defendant in Mr. Hunt's submission must be taken to be asserting that the accident took place at a time when it was not dark, and in those circumstances the plaintiff is entitled to particulars as to the time when the defendant alleges that the accident took place. Thirdly, Mr. Hunt submits that the object of pleadings is to prevent either party being taken by surprise at the trial, and to enable the parties to know what case they have to meet. He relies on O. 6, r. 9, which reads as follows:

"When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if the allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances."

Mr. Hunt submits that the defendant's pleading in this case is evasive. In admitting the date and place of the accident, but not admitting the time, the defendant is in effect alleging that the accident took place at a different time, and he should be made to give particulars of this allegation.

Mr. Dholakia for the defendant/respondent submits that all that the defendant has done is to traverse the plaintiff's statement that the accident took place at 7.45 p.m. and put him to proof of that allegation. A traverse of a positive allegation does not constitute an assertion of fact, and a defendant cannot be ordered to particularize the mere non-admission of a pleaded fact. This is not a case of a traverse of a negative averment, which might involve an affirmative allegation (*Pinson v. Lloyds Bank*, [1941] 2 All E.R. 636). Mr. Dholakia also submits that a defendant should not be required to disclose particulars of the circumstances of an accident which he has admitted did take place, and he relies in this respect on *Fox v. H. Wood (Harrow), Ltd.*, [1962] 3 All E.R. 1100, and submits that the time at which an admitted accident occurred is one of its circumstances. I may say at once that I disagree with this submission. It is clear from the judgment of Diplock, L.J., in *Fox's* case, with which the other members of the court agreed, that by the circumstances of an accident he meant *how* and not *when* it happened. Mr. Dholakia also relied on the judgment of Pennycuik, J., in *Chapple v. Electrical Trades Union*, [1961] 3 All E.R. 612, in which the learned judge cited with approval the notes to O. 19, r. 6 R.S.C. in the Annual Practice, 1961, and in particular this extract therefrom:

"Traverse by defendant. A traverse by a defendant even of a negative allegation which the plaintiff must establish in order to succeed is not a matter stated of which particulars will be ordered, but particulars may be ordered where the traverse involves a positive allegation."

I am content to accept the above as a correct statement of the law on the subject with which this appeal is concerned. The answer in this appeal depends in my view on whether the defendant's refusal to admit the plaintiff's assertion that the accident occurred at 7.45 p.m., and therefore in the hours of darkness, implies a positive assertion on the part of the defendant that the accident occurred at a time other than in the hours of darkness. I agree with Mr. Hunt that there is no effective difference between a refusal to admit a fact and a denial of that fact. The exact time at which an accident occurred is not normally of material importance, but it is material in this case in view of the allegations of negligence in relation to lights. The fact that the defendant has gone out of his way, whilst admitting the date and place of the accident, to deny the time of its happening, raises to my mind a strong inference that the defendant considers the time of the accident to be a material factor in this case. It would be material if the time contended for by the defence is a time during the hours of daylight, in which case those allegations of negligence relating to lights and to failure to stop because of darkness would fail. If in fact the defendant will contend at the trial that the accident occurred in the hours of daylight, then I consider that the plaintiff is entitled to be so informed, in order not to be taken by surprise. In *Thorp v. Holdsworth* (1876), 3 Ch.D. 637, the defendant pleaded as follows:

"The defendant denies that the terms of the arrangement between himself and the plaintiff were definitely agreed upon as alleged."

Such a denial was held by Jessel, M.R., to be evasive, under O. 19, r. 12 R.S.C. as it was then expressed, which was in identical terminology with that of O. 6, r. 9 of the Uganda Civil Procedure Rules. As the Master of the Rolls commented "it is the very object we have always had in pleading to know what the defendant's version of the matter is in order that the parties may come to an issue". In my view the position in this appeal is comparable. To say in a defence that it is not admitted, or that it is denied, that an event took place at the time alleged in the plaint is in my opinion an evasive plea within the meaning of O. 6, r. 9, especially when time as in this case may well be a material factor. If the defendant is contending that the accident took place at a time other than "at about 7.45 p.m."

as pleaded in the plaint, then to comply with O. 6, r. 9 he should specify the time for which he contends. If he is not so contending, he should not have traversed the allegation as to time. I consider that the plaintiff is entitled to know what the defendant's version is in relation to time of the accident, which has been put in issue by the defendant. I would allow this appeal.

Sir Clement De Lestang V-P: The facts giving rise to this appeal are fully stated in the judgment of Law, J.A., and I will not repeat them. Suffice it to say that the appellant, who was the plaintiff in the court below, averred in his plaint that the accident on which his claim was founded occurred at 7.45 p.m. on the day and at the place stated. The respondent admitted that the accident had taken place on the date and at the place stated but did not admit that "it occurred at 7.45 p.m. as alleged".

As the appellant's case is partly founded on the accident having occurred in darkness, the time is clearly a material factor in the case. I do not think also that there is any material difference between a non-admission and a denial.

It is contended for the appellant that in these circumstances the respondent's defence is evasive and that unless he gives particulars of the time when the accident occurred the appellant would be taken by surprise at the trial if it were sought to prove that it occurred in daylight. I cannot see any merit in the latter contention. Surely it is for the appellant to prove his case and he knows that time is in issue. I fail to see how in these circumstances he can say that he would be taken by surprise on the matter of time.

As regards the allegation of evasiveness, a denial in the form in which it was made in this case is an extremely common form of pleading and does not seem to me to be embarrassing as it makes it quite clear that time is in issue.

The Civil Procedure Rules of Uganda on the subject of particulars are not materially different from the rules of the Supreme Court in England and consequently guidance may be obtained from the decided English cases. In *Fox v. H. Wood (Harrow), Ltd.*, [1962] 3 All E.R. 1100, a workman put his foot in a hole in the floor at his place of work; he fell and was injured. In an action by the workman against his employers for damages for negligence, the defendants, by their defence, alleged contributory negligence and pleaded:

"It is admitted that the plaintiff suffered an accident on the date referred to in the statement of claim during the course of his employment, but no admissions are made as to the circumstances of the alleged accident."

The plaintiff applied for particulars of the accident admitted and for a description of it, saying when and where it occurred. It was held by the Court of Appeal that the defendants should not be ordered to give particulars of the accident admitted. I cannot distinguish the present case from that case, and I would, with respect, endorse what Diplock, L.J., said in it ([1962] 3 All E.R. at p. 1102):

"I might add that the only effect of permitting particulars to be given where the pleading is in this form would be to dissuade defendants from making such admissions as they can to limit the issues at the trial."

I would accordingly dismiss this appeal and as Spry, J.A., is of the same view, the appeal is dismissed with costs.

Appeal dismissed.

For the appellant:

RE Hunt

RE Hunt, Kampala

For the respondent:
BD Dholakia
Parekhji & Co, Kampala

Rwabugahya v East African Newspapers (Nation Series) Ltd
[1968] 1 EA 576 (HCU)

Division: High Court of Uganda at Kampala
Date of judgment: 12 July 1968
Case Number: 675/1966 (107/68)
Before: Sheridan J
Sourced by: LawAfrica

[1] Defamation – Libel – Photograph – Advertisement in newspaper showing another person – Plaintiff calling evidence that he had been identified from photograph – No name attached to photograph – Whether plaintiff can succeed.

[2] Defamation – Reference to plaintiff – Whether plaintiff can succeed in libel suit based on photograph of another person.

Editor’s Summary

The plaintiff, a doctor, claimed damages for libel based on an advertisement published in a newspaper by the defendant. The advertisement was for a deodorant called “Mum Mist”, and consisted of a photograph of three couples dancing, with a caption beneath. The plaintiff alleged that he was one of the men shown in the photograph. The defendant conceded that, if the plaintiff was in the photograph, then he had been libelled. The plaintiff did not give evidence, but called four witnesses who claimed to have identified him in the photograph. The defendant, however, proved that the photograph was not of the plaintiff but in fact showed another man altogether.

Held –

- (i) while it is not necessary that the advertisement should refer to the plaintiff by name it must be understood by reasonable people to refer to him (*Newstead v. London Express Newspaper Ltd.* (1) adopted);
- (ii) the plaintiff should not succeed in respect of an unnamed photograph of another man being used for advertisement purposes.

Suit dismissed with costs.

Cases referred to in judgment:

- (1) *Newstead v. London Express Newspaper, Ltd.*, [1940] 1 K.B. 377.

(2) *Tolley v. Fry (J. S.) & Sons, Ltd.*, [1931] A.C. 333.

Judgment

Sheridan J: The plaintiff claims damages for libel in respect of an advertisement which appeared on p. 14 of the issue of “Daily Nation” dated January 28, 1966. The advertisement (Exh. A) consists of a photograph of three couples dancing with a photograph of a “MUM MIST” bottle and the following caption beneath:

“WHEN THERE’S
MUSIC IN THE AIR . . .
MAKE SURE YOU’RE
NICE TO BE NEAR
WITH MUM

Don’t let embarrassing perspiration spoil your fun. Rub a little MUM under your arms every day and make sure you are always nice to be near. MUM stops ugly perspiration smell and stops perspiration staining your clothes too! Choose the MUM you like best – Rollette-stick-mist or MUM for men. Use it every day. You’ll see why popular people all over the world say MUM.

MUM makes you nice to be near.”

The plaintiff is a medical practitioner. It is conceded by the defendants that if he is in the photograph he has been guilty of a breach of professional etiquette and is entitled to damages.

Although the plaintiff himself did not see fit to give evidence I am prepared to presume that he did not give his consent to the use of his photograph for this commercial purpose. Four witnesses gave evidence that they identified the plaintiff in the advertisement and drew his attention to it. The inference is that this is a photograph taken in a Kampala night club of which an unauthorised use has been made.

The defence is that this is a studio photograph taken for advertisement purposes in Salisbury, Rhodesia and this fact has been proved up to the hilt.

Although the four witnesses for the plaintiff testified that they thought the photograph was of the plaintiff and that it was not of Robert Mpemba who in fact posed for it, my immediate reaction comparing the photograph of the advertisement (Exhibit E) with a photograph of the plaintiff (Exhibit B) is that the former is of an older man. Further, the shape of the head and the receding hairline are different. I think the witnesses may have been misled by the smile on the man's face, which is similar.

Mr. Mayanja, for the plaintiff, stated that he proposed to call the plaintiff's dancing partner and that he had taken a statement from her. I would have been interested to see her in the witness box I am quite satisfied that the girl in Exhibit E is the same girl as shown in the stills (Exhibit G) taken in Salisbury the only difference being, as Mr. Mpemba stated, that she was not all the time wearing her glasses. The pleats in the dress show that it is the same dress. I regard the photograph of the plaintiff with a girl in his arms in a dancing position (Exhibit C) as a crude and unconvincing attempt to reproduce part of the advertisement.

While it is not necessary that the advertisement should refer to the plaintiff by name it must be understood by reasonable people to refer to him (*Newstead v. London Express Newspaper, Ltd.*, [1940] 1 K.B. 377).

I accept it that a person can be depicted by a photograph as by a caricature or a verbal description, but counsel have not been able to refer me to a precedent where a plaintiff has succeeded in respect of an unnamed photograph of another man being used for advertisement purposes. In the absence of an authority I should be reluctant to hold that such was the law. The nearest approach is *Tolley v. Fry (J. S.) & Sons, Ltd.*, [1931] A.C. 333 where a caricature of a well known amateur golfer was used in juxtaposition to an advertisement for a brand of chocolates suggesting that he had prostituted his reputation as an amateur golfer for advertising purposes; but even there the limerick below the caricature referred to Tolley by name.

The plaintiff has tried to cash in on the superficial likeness between him and one of the three men in the advertisement, who is in fact Robert Mpemba. He fails. The suit is dismissed with costs.

No argument was addressed to me on the amount of damages which should be awarded in the event of liability being established so I make no finding in regard to them.

Suit dismissed with costs.

For the plaintiff:

AK Mayanja

Abu Mayanja & Co, Kampala

For the defendant:
OJ Keeble
Hunter & Greig, Kampala

Rajabali v Curtis
[1968] 1 EA 578 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam
Date of judgment: 23 February 1968
Case Number: 5/1966 (108/68)
Before: Biron J
Sourced by: LawAfrica

[1] Matrimonial Causes – Jurisdiction – Asian wife and non-Asian husband – Both Muslims – Whether Primary Court has jurisdiction – Magistrates’ Courts Act 1963, ss. 3 (1), 14 (1) and 42 (T.).

[2] Matrimonial Causes – Divorce – Maintenance – Muslim marriage – Parties of limited means – Divorce granted by Primary Court – Whether that Court should deal with questions of maintenance raised by wife on petition to High Court – Civil Procedure Code, s. 13 (T.).

Editor’s Summary

The parties, who were Muslims, were married according to Muslim rites and subsequently were divorced under Muslim law before the Primary Court of Lindi. The petitioner wife was an Asian whereas the respondent husband apparently was not. There were indications that the Primary Court had already dealt with questions of maintenance. The wife then brought this petition in the High Court claiming maintenance. The parties were of limited means.

Held – the petition should be transferred to the Primary Court (in spite of possible doubts about the jurisdiction of that Court).

Petition transferred to the Primary Court of Lindi.

No cases referred to in judgment

Judgment

Biron J: The petitioner is claiming maintenance due to her during the subsistence of her marriage to the respondent which was subsequently dissolved.

The parties are Muslims, they were married according to Muslim rites, and divorced under Islamic law before the Primary Court of Lindi. The proper venue for this petition would therefore appear to be the primary court which dissolved the marriage, the relief sought being ancillary to the divorce

proceedings. In fact, as agreed to by Mr. Kassam who appeared for the petitioner, the most practical course would be for this petition to be heard by the primary court within the jurisdiction of which both parties live. Neither party has appeared today, and the hearing could obviously not go on in their absence. Even if the hearing were adjourned, there is no indication that either party would, or even could, appear, due to their limited resources. Further, if the primary court has jurisdiction, then it should, in the observance of due procedural propriety, hear this petition, as by s. 13 of the Civil Procedure Code 1966:

“Every suit shall be instituted in the court of the lowest grade competent to try it.”

But the question, by no means an easy one, which immediately poses itself is: has the primary court jurisdiction, as the petitioner is an Asian, although the respondent apparently is not?

By s. 14 (1) of the Magistrates’ Courts Act 1963:

“14. (1) A primary court shall have and exercise jurisdiction –

- (a) in all proceedings of a civil nature where the law applicable is customary law or Islamic law:

Provided that no primary court shall have jurisdiction in any proceedings

- (a) . . .

- (b) in which Islamic law is applicable by virtue of the provisions of the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance.”

And by s. 3 (1) of the Ordinance jurisdiction is expressly conferred on, and therefore limited to, the High Court, though it should be added, if only for the record, that jurisdiction has been expressly conferred on some subordinate courts, but this has no application to this instant case.

As noted, the marriage was dissolved by the Lindi primary court. It could, perhaps, therefore be argued, and, it must be conceded at once, not with a great deal of substance, that by appearing before the primary court the parties thereby conferred jurisdiction on it. As indicated, this argument is not particularly persuasive. Even so, the practical position cannot be ignored. The parties have in fact been duly divorced by the primary court. Although its jurisdiction may be called into question, I am very far from persuaded that this Court would now ex proprio motu be justified in interfering in revision with the decree granted by the primary court. The parties, or either of them, may by now have remarried and begotten children. To interfere with the divorce granted would in effect mean bastardising the children, that is of the petitioner, if she has remarried. The remarriage of the respondent would not have such results, as he is permitted polygamous unions. In having granted the parties a divorce, and as would appear from the proceedings the primary court also dealt with the question of “mohr”, and, at least according to the respondent, there was a payment in or through the court in respect of maintenance, the primary court is not only seized with the matter as a matrimonial cause, but, even on the aspect of the ancillary relief of maintenance, in respect of which this petition has been brought, Therefore, although not really persuaded as to the position in law, I consider that the best course would be, Mr. Kassam being of the same view, to transfer this position to the primary court under s. 42 of the Magistrates’ Courts Act.

It is accordingly ordered that the petition be transferred to the Lindi primary court. It should be made perfectly clear that no further court fees are payable by the petitioner.

Order accordingly.

For the petitioner:

NM Kassam

Kassam & Co, Dar-es-Salaam

The respondent neither appeared nor was represented.

Republic v V B Patel and Company (Mwanza) Ltd
[1968] 1 EA 580 (HCT)

Division: High Court of Tanzania at Mwanza

Date of judgment: 11 April 1968

Case Number: 985/1967 (109/68)

Before: Mustafa J

Sourced by: LawAfrica

[1] Criminal Law – National Provident Fund – Failing to comply with N.P.F. Act – Company employing ten persons – nine regular and one temporary employee – Whether Company liable to register – Whether offence disclosed – National Provident Fund Act, ss. 2, 38 (1) (d) and (f).

[2] Social Security – National Provident Fund – “Person in apparent control” – Whether clerk in branch office of company is such a person – National Provident Fund Act, s. 43 (T.).

[3] Social Security – National Provident Fund – Employees – Whether company employing nine regular and one temporary employees is liable to register as employing a minimum of ten employees – National Provident Fund Act (Cap. 564), ss. 2, 8 (1), 11 (1) (1) (b), 38 (1) (d) and (f) and 48; and National Provident Fund Regulations, reg. 6 (T.).

Editor’s Summary

Under the National Provident Fund Act of Tanzania a private employer is liable to be registered as a contributing employer to the Fund if he employs a minimum of ten employees. The respondent company employed nine regular employees and one casual labourer described as a temporary employee. An inspector under the Act visited the company’s shop and spoke to one Patel, a clerk in charge of the shop. The inspector filled in form NPF 1 under the National Provident Fund Regulations on information supplied by Patel, and Patel signed it for the company. This form was then sent to the Fund by the respondent company for registration as a contributing employer. The respondent company was duly registered as a contributing employer and was assigned a registration number. Later the inspector again visited the shop and asked Patel to complete form NPF 3 giving particulars of the registrable employees of the company. This Patel refused to do, on the grounds that the company had less than ten registrable employees, because one of its ten employees was not registrable, being a casual labourer. As a result of this refusal the company was charged with (a) failing to comply with reg. 6 of the National Provident Fund Regulations, (b) failing to pay contributions due to the Fund. The company was acquitted on both counts by the trial magistrate, who ruled that the company was not liable to register because it had less than ten employees and also that Patel’s action in signing the form NPF I did not bind the company. The Republic appealed, arguing that “employee” in the Act includes a temporary employee for the purpose of registering employers although temporary employees are not registrable as members of the Fund; and that the company was therefore guilty of an offence in not completing form NPF 3.

Held –

- (a) (i) on the facts, Patel was a “person in apparent control” so as to make the respondent company liable for his acts under s. 43 of the National Provident Fund Act;
- (ii) a casual labourer is an employee registrable for the purposes of the Act as regards the registration by a contributing employer; therefore
- (iii) the respondent company was guilty of an offence under reg. 6;

but (b) there was no evidence of any offence of failing to pay contributions under s. 38 (1) (d) of the

Act, which could only arise after form NPF 3 had been sent in to the fund.

Appeal allowed in part. Case remitted to the magistrate with a direction that there was a case to answer on the first count.

No cases referred to in judgment

Judgment

Mustafa J: This is an appeal by way of case stated from the determination of the resident magistrate, Mwanza. The respondent company was charged with two counts:

- | | |
|---------------|---|
| First count: | Failing to comply with reg. 6 made under s. 48 of the National Provident Fund Act No. 36 of 1964 (Cap. 564 of the Laws) as a result of which there is a loss to the Fund contrary to s. 38 (1) (f) National Provident Fund Act. |
| Second count: | Failing to pay within the prescribed period contribution due and payable to the Fund c/s 38 (1) (d) National Provident Fund Act. |

The trial magistrate ruled that the prosecution has failed to establish a *prima facie* case against the company and dismissed the charges and acquitted the company on both counts. From that acquittal the Republic appeals.

The agreed facts are:

- (1) The respondent company is a private limited liability company and at the material time had seven regular and one temporary employees in its head office in Mwanza and two regular employees at its branch in Tabora, the material time being the period from February 1, 1967 to May 31, 1967.
- (2) One Dilip Patel being a clerk at the material time was in the Mwanza office in charge of the running of the shop and he had power to employ temporary employees.
- (3) It was Dilip Patel who supplied information to the inspector/compliance officer on April 1, 1967 when the inspector visited the shop in Mwanza. The prosecution relied on this information as regards the number of employees employed by the respondent company.
- (4) The inspector on the information supplied by Dilip Patel completed the appropriate form NPF 1, which Dilip Patel signed – according to Dilip Patel at the insistence of the inspector – and that form was forwarded to the Director of the Fund by the respondent company for registration as a contributing employer in terms of reg. 4 of Government Notice No. 582/64.
- (5) A notification to the respondent company that it has been registered as a contributing employer and that its registration number was 26182 was duly sent to and received by the company.
- (6) On or about June 19, 1967 the inspector again called at the company's office at Mwanza and saw Dilip Patel who was still in charge and asked him to complete the appropriate form being NPF 3 in respect of the company's registrable employees as members of the Provident Fund. At this stage Dilip Patel refused to complete the form NPF 3 on the ground that the company has less than ten registrable employees, as one of the employees, being a temporary employee, is not registrable as a member of the Provident Fund. According to the relevant schedule a private employer is liable to be registered as a contributing employer to the Fund only when it employs a minimum of ten employees.

As a result of the refusal by Dilip Patel to complete form NPF 3 the company was charged with the two counts above referred to.

It is agreed by both learned counsel that the second count as regards the failure to pay within the prescribed period the contribution to the Fund only arises if the company is liable to complete and forward form NPF 3 to the Director of the Fund.

The points of law as submitted by the trial magistrate are as follows:

- “(1) Whether the action of P.W.1 (i.e., the inspector) and P.W.2 (i.e., Dilip Patel) would create liability binding on the accused company?
- “(2) Whether a casual labourer not being a temporary employee is an employee for the purposes of National Provident Fund Act 1964 as regards registration as a contributing employer?
- “(3) Whether this court erred in dealing with the question whether the employer was liable for registration as a contributing employer and in dealing with the way the application was made instead of accepting the notification for registration (Exh. B) as conclusive proof of the company’s liability under reg. 6 made under s. 48 of Act 36 of 1964 and s. 38 (1) (f) and s. 38 (1) (d) of the same Act?”

It appears the trial magistrate ruled that the company had less than ten employees. He ruled as one of the employees was a casual labourer the respondent company is not liable for registration as the liability to register applied only to those private employers who have a minimum of ten employees. The trial magistrate also ruled Dilip Patel’s action did not bind the company.

Learned State Attorney argues that an employee as defined in s. 2 of Cap. 564 includes a temporary employee. Employee is defined as follows:

“means any person who –

- (a) is employed in Tanganyika under any contract of service or apprenticeship with an employer whether by way of manual labour, clerical work or otherwise and howsoever paid, such contract not being one of employment as a member of the crew of any ship;”

Learned State Attorney has argued that a casual labourer is a temporary employee and as such is an employee within the definition of the above section. He argues that with regard to the duty to register as a contributing employer to the Fund the company had ten employees and therefore was liable to complete and forward form NPF 1.

It is true in terms of s. 8 of the National Provident Fund Act (Cap. 564) a temporary employee is not registrable as a member of the Provident Fund unless so declared by the Minister. Section 8 (1) (a) reads:

- “8 (1) Subject to the provisions of this Part, the Minister may by order in the *Gazette* –
 - “(a) declare any employees or category of employees to be registrable as members of the Fund;”

Section 11 (b) reads:

- “11 (1) Notwithstanding the foregoing provisions of this Part –
 - (a) . . .
 - (b) No person shall be registered as a member of the Fund at any time when he is a temporary employee unless the Minister shall by order under this section and published in the *Gazette* have declared temporary employees generally or temporary employees of a category to which he belongs to be registrable as members of the Fund under this Act.”

There is no evidence that temporary employees or temporary employees of the relevant category were declared as registrable members of the National Provident Fund.

However, learned State Attorney argues that there are two kinds of registration; one kind of registration is the liability of an employer with a minimum of ten employees to register as a contributing employer to the Fund by completing and forwarding form NPF 1; the other is that of an employee who is a registrable member of the National Provident Fund.

In this case he has argued the company had ten employees as defined in s. 2 of the National Provident Fund Act and was therefore liable to submit and forward NPF 1 as a contributing employer to the Fund. In fact the company has done so and has duly received its registration No. 26182. After the submission of the said form NPF 1 the company would be liable to comply with reg. 6 made under s. 48 of the Act by completing and forwarding another appropriate form, namely form NPF 3, in respect of registrable employees. It is when such form NPF 3 has been submitted that the Director of National Provident Fund will determine, on the basis of details supplied, which employee would or would not be a registrable member of the National Provident Fund. (Incidentally, it is clear that a temporary employee would not be registrable as a member of the National Provident Fund). Learned State Attorney also refers to Government Notice No. 39 of 1968 which reads:

“Section 2. The Schedule to the principal Order is hereby amended: –

(This refers to the schedule to the principal Order Government Notice No. 566 of 1964.)

(b) by adding the following note at the end of the schedule.

Note: For the avoidance of doubt it is hereby declared that in calculating the number of employees for the purposes of determining whether any private employer falls within any of the above items of this Schedule, the exempt and temporary employees and the members of the crew in the employment of such employer shall be taken into account, although such exempt or temporary employees or members of the crew will not themselves be registrable.”

Learned State Attorney argues that the failure of the company to complete and forward form NPF 3 was an offence in terms of the first count as above referred to.

Learned counsel for the company has argued that in any event Dilip Patel was not a director, manager, secretary or principal officer of the company. He was merely a clerk in charge of the shop in Mwanza. His action therefore cannot bind the company. He also argues that the company has only nine regular employees at the relevant time and he seems to state that because a temporary employee is not registrable as a member of the Fund he therefore cannot be taken into account in determining whether the company is registrable as a contributing employer.

It is in evidence that when the inspector visited the Mwanza shop of the company Dilip Patel was the only person he found there. Dilip Patel was in apparent control of the company. It is agreed that Dilip Patel had power to employ temporary employees. In any event he signed the form NPF 1 although he said he was forced to do so by the inspector. Be that as it may, Dilip Patel signed the form without reference to any other person. Dilip Patel has stated in evidence that he is merely a clerk and that he could not sign cheques or agreements on behalf of the company. He, nevertheless, signed the form which was completed by the inspector on information supplied by Dilip Patel.

I am satisfied at the material time Dilip Patel was in apparent control of the company. Section 43 of the National Provident Fund Act (Cap. 564) reads:

“Where an offence under this Act by any association of persons, whether corporate or unincorporate, is found to have been committed with the knowledge or connivance of, or is attributable to any act or default on the part of any person or person in apparent control of the association of persons, the person or persons in apparent control and the association of persons shall be deemed to have been committed the offence.”

I agree with the view that there are two kinds of registration, one in respect of the contributing employer to the Fund and one in respect of registrable employees as members of the Fund. I am also of the view that the company had ten employees at the material time and was liable to register as a contributing employer to the Fund. I hold Dilip Patel’s act is binding on the company as Dilip Patel at the material time was in apparent control of the company. In answer to the questions of law posed by the trial magistrate I state:

- (1) Yes, the action of P.W.1 Dilip Patel would create a liability binding on the accused company.
- (2) A casual labourer is an employee registrable for the purposes of the National Provident Fund Act 1964 as regards the registration by a contributing employer. It is not understood what is meant by “a casual labourer not being a temporary employee”.
- (3) Yes, the court erred in its approach. The question whether the notification for registration Exh. B is conclusive proof of the company’s liability under reg. 6 does not arise in the circumstances.

In my view, there was clear evidence that the company has committed an offence contrary to count 1 as charged in that it failed to complete or have completed and forwarded to the Director of National Provident Fund the appropriate form namely NPF 3 in respect of its registrable employees in terms of reg. 6 made under s. 48 of the National Provident Fund Act.

However, I think there is no evidence of any offence as regards the second count, that is, failure to pay contribution due and payable to the Fund. That can only arise after an employer had completed and forwarded to the Director of National Provident Fund form NPF 3. That has still not been done and therefore the failure to pay in terms of s. 38 (1) (d) of the National Provident Fund Act, has not arisen.

I, therefore, return the case to the learned resident magistrate with a direction that there is a case to answer in respect of the first count. He shall proceed to deal with it in the light of what I have stated. However, as regards the second count there is no evidence that any offence has been committed.

The appeal is partially successful as above indicated.

Order accordingly.

For the appellant:

G Liundi (State Attorney, Tanzania)

Attorney General, Tanzania

For the respondent:

DN Parekh

DN Parekh, Mwanza

Commissioner of Lands v Hussein
[1968] 1 EA 585 (HCK)

Division: High Court of Kenya at Nairobi
Date of judgment: 31 January 1968
Case Number: 1655/1961 (110/68)
Before: Harris J
Sourced by: LawAfrica

[1] Civil Practice and Procedure – Joinder of parties – Deceased estate – Claim against devisee – Necessity of joining executors and trustees – Civil Procedure (Revised) Rules 1948, O. 7, r. 8 (2) (K.).

[2] Constitutional Law – Crown – Estoppel – Operation of equitable estoppel by acts of Army authorities in Kenya in 1942 – Whether Commissioner of Lands estopped in suit brought after Independence (K.).

[3] Estoppel – Equitable – By acquiescence – Army authorities encouraging defendant’s predecessor in title to build canteen building on land occupied by Army on condition lease would be granted – No lease granted – Army no longer in occupation – Whether Commissioner of Lands estopped from claiming possession from defendant (K.).

[4] Land – Prescription – Prescriptive limitation – Whether English law applicable in Kenya – Prescription Act 1832, of England (K.).

[5] Limitation of action – Land – Prescriptive limitation – Claim for possession – Government land – Whether limitation can apply – Government Lands Act, Cap. 155, s. 133 (K.).

[6] Prescription – Land – Government land – Whether prescriptive title acquired – No entry on register – Whether English law applies.

Editor’s Summary

In 1942 the army authorities verbally suggested to the defendant’s father that he should, at his own expense, erect buildings for a canteen on an area of land in Nairobi then occupied by the Army and known as “Buller Camp”. The defendant’s father accepted the suggestion on condition that he was given a lease. He asked for a term of fifty years, but an army officer who was present at the crucial meeting suggested thirty years. The defendant’s father had plans prepared and approved by the Army and spent a substantial amount of money in putting up a building. The land of Buller Camp, including the site of the building, was and remained unalienated Crown (later Government) land subject to the Crown (later the Government) Lands Act. In 1964 the Army moved out of the land, which was then handed over to the Ministry of Health. The defendant’s father died in 1956, leaving a will by which he appointed the defendant and another person his executors and trustees and left all his property upon trust for sale with a life interest in the income for his widow. The widow continued to live in the building and to use it as a shop, and the defendant occupied a room in it rent free. No lease or other registrable interest was ever

given to the defendant's father although he, and after his death the defendant, made several requests in correspondence between 1942 and 1965 for a lease of not less than thirty years. The plaintiff, on the other hand, on several occasions required the defendant's father and later the defendant to quit the premises; and eventually brought this action for possession against the defendant. The defendant in his defence claimed, in effect, that the plaintiff was prevented from ejecting him by the doctrine of equitable estoppel, relying on the putting up of the building by his father at the instigation of the Army. The defendant also raised various other issues, including prescription and prescriptive limitation.

Held –

- (a) no relief could be granted in the suit as framed which would adversely affect the estate of the defendant's father or his trustees as such, they not having been joined as parties as required under O. 7, r. 8 (2) of the Civil Procedure (Revised) Rules 1948;
- (b) assuming that the plaintiff could proceed against the defendant in his personal capacity in respect of the room occupied by the defendant; then:
 - (i) the land was vested in the Government and the defendant had no legal title;
 - (ii) assuming (without deciding) that the English law of prescription applied to Kenya, the defendant had failed to establish a prescriptive title because no entry appeared in the land register under the Government Lands Act to support such a title, and there was no suggestion that the register was incomplete;
 - (iii) the defendant could not rely on limitation because of the terms of s. 133 of the Government Lands Act; but
- (c)
 - (i) the army authorities had encouraged the defendant's father, the defendant's predecessor in title, to spend money on erecting the building on the understanding, fostered by them, that he could and would be given a reasonable measure of security of tenure;
 - (ii) the actions of the army authorities must be regarded as the actions of the Crown in its executive capacity (*Nyali, Ltd. v. Attorney-General* (10)) applied;
 - (iii) the plaintiff at the date of filing the action also represented "the Crown" in its executive capacity for the purpose of estoppel;
 - (iv) despite the disappearance of the Crown from the domestic law of Kenya, the defence of estoppel was still available to the defendant; therefore
 - (v) the plaintiff was estopped by acquiescence from claiming possession of the suit premises (statement of Lord Kingsdown in *Ramsden v. Dyson* (3) adopted and applied).

Suit dismissed with costs, but without prejudice to a fresh suit being brought after 1972.

Cases referred to in judgment:

- (1) *Bejoy Chunder Banerjee v. Kelly Prosonno Mookerjee* (1879), I.L.R. 4 Cal. 327.
- (2) *Parameswaram Mumbannoo v. Krishnan Tengal* (1902), I.L.R. 26 Mad. 535.
- (3) *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129.
- (4) *Gregory v. Mighell* (1811), 18 Ves. 328; 34 E.R. 1211.
- (5) *Philling v. Armitage* (1805), 12 Ves. 78; 33 E.R. 31.
- (6) *Plimmer v. The Mayor, Councillors and Citizens of the City of Wellington* (1884), 9 A.C. 699.
- (7) *Inwards v. Baker*, [1965] 2 Q.B. 29.
- (8) *Ward v. Kirkland*, [1966] 1 W.L.R. 601.
- (9) *E.R. Ives Investments, Ltd. v. High*, [1967] 1 All E.R. 504.

(10) *Nyali, Ltd. v. Attorney-General*, [1957] A.C. 253.

(11) *Dillwyn v. Llewellyn* (1862), 4 De G.F. & J. 517; 45 E.R. 1285.

(12) *Ahmad Yar Khan v. Secretary of State for India in Council* (1901), L.R. 28 I.A. 211.

Judgment

Harris J: This is an action brought by the Commissioner of Lands claiming possession of a piece of unsurveyed land on Mbagathi Road in the city of Nairobi forming portion of what is or was formerly known as

“Buller Camp” and upon which stands a one-storeyed stone building used by the defendant and some of his relatives for business and residential purposes.

It is desirable, in the first place, to refer shortly to the pleadings. In para. 3 the plaintiff states that:

“By a declaration made on the 10th day of July, 1918, the Governor and Commander-in-Chief of the Colony and Protectorate of Kenya on behalf of His Most Gracious Majesty King George the Fifth declared the boundary of the Nairobi Military Area to comprise certain unalienated Crown land situate in Nairobi which said area is at present known as “Buller Camp”.

In proof of this assertion the plaintiff relies upon a notice in the Official *Gazette* of that date but, apart from the fact that there was then no geographical or political entity known as “the Colony and Protectorate of Kenya”, this notice does not purport to be a declaration by the Governor and Commander-in-Chief, and bears neither a signature nor a date. It might have been prepared and inserted by any person or authority, public or private, for it appears in the Official *Gazette* as a “general notice” into which category falls a varied collection of items, many of them unofficial, and the plaintiff’s case derives no strength from it.

The plaintiff continues by claiming, in the fourth paragraph, that “the said declaration” did not operate so as to divest the plaintiff of all or any of his proprietary and possessory rights over and in the land referred to, and in its fifth, sixth and eighth paragraphs the plaintiff alleges that the defendant is unlawfully and without right, title or licence in possession of “a parcel” of the land referred to in the “declaration”, which parcel has been at all material times and is “Crown Land” (now called “Government land”), and that he wilfully refuses to vacate.

The plaintiff’s averment that the land is “Crown Land” is not denied in the defence and accordingly the relevant provisions of the former Crown Lands Act (now known as the Government Lands Act and to which for convenience I will refer as “the Lands Act”) have application. By s. 99 of the Act, which forms portion of Part X, it is required that:

“All transactions entered into, affecting or conferring or purporting to confer, limit or extinguish any right, title or interest, whether vested or contingent to, in or over land registered under this Part (other than a letting for one year only or for any term not exceeding one year), and all mutations of title by succession or otherwise, shall be registered under this Part.”

For the purpose of this provision the expression “land registered under this Part” means, by virtue of s. 91, land in respect of which the conveyance, lease or licence from the Crown or Government is required by Part X to be registered in the registration office set up under s. 93.

A witness called by the plaintiff, named Yonge, who is a land officer in the Lands Department, said in evidence that he had inspected the relevant land register and found that there is no entry therein relating to the suit premises. In cross-examination he said that the lands had been reserved for the army for so long as it was there, that the army could have done what it wished on the lands provided that it did not injure the reversion, that the plaintiff was not concerned with what the army did and, so far as the witness knew, could not have objected to the erection of buildings and would not necessarily have been aware of the existence of the canteen building had he not been so informed in certain correspondence. He said that in the year 1964 the premises had been relinquished by the army and handed over to the Ministry of Health through the plaintiff, that that Ministry is now in lawful occupation and that the erection of

buildings on the plot would now be a matter for that Ministry. He added that the Ministry was put into occupation as an administrative act not recorded on the land register, that there was no evidence to show that the plaintiff had ever divested himself of his statutory authority over the lands or conferred any legal title upon anybody, and that neither the army nor the Ministry of Health could itself have conferred any title. I am satisfied from the evidence of Mr. Yonge, which was not seriously controverted and which I accept, that the premises do not appear in the register maintained under the Act, that the defendant has no legal title to them and that, subject to the issues raised in the defence, the plaintiff is entitled to succeed in his claim.

The case for the defendant is based primarily upon pleas of an equitable nature and not appearing very clearly from his statement of defence and for the determination of which it is necessary to consider the evidence tendered in support. In his evidence the defendant said that he is a son and one of the executors of the will of his late father, Hussein Mohamed Moti (to whom for convenience I will refer as “the deceased”), who died on August 13, 1956 leaving him surviving his widow, Amina Abubaker, and three sons including the defendant. By this will, made two days before he died, the deceased appointed the defendant and one, Manidhar Amin, to be his executors and trustees, and bequeathed all his property to his trustees upon trust for sale (with power to postpone) and investment and to hold the proceeds upon trust to pay the income to his widow for life with remainders over. The will was proved by the executors, each of whom is still alive, the second-named being now in India. The defendant stated that his parents had lived together in the suit premises, which consist of what he described as “a big stone house with iron sheets on the roof”, and that his mother, who is aged about sixty-seven years, occupies the premises now together with several of her children (including the defendant) and grandchildren, all of whom live there rent free. His mother conducts a grocery shop on the premises under the name of the deceased, holding a licence under the Registration of Business Names Act, and employs two salesmen in the business in addition to working there herself. The defendant said that he occupies one room in the premises, which has been placed at his disposal free of rent, but that he takes no part in running the business and is, in fact, employed elsewhere.

The only other witness called by the defendant was a former officer in the King’s African Rifles, named Deakin, who has lived in this country for the last fifty years and had known the deceased since the time of the First World War. He said that in the year 1940 he was seconded to that regiment as a lieutenant and quarter-master and was in charge of buildings and equipment in what later became known as “Buller Camp”, at which time the deceased was running a canteen within a few yards of the suit premises in a wood and iron building. The witness was still in charge of buildings and equipment in 1942 and recalled that at some time during that year he had inspected the canteen in company with a group of high-ranking officers comprising General Weatherall, Colonel Modera, Colonel Evans, and the medical officer, and other persons including the deceased. The General asked the deceased if he would be prepared to erect on the site what the witness described as “a decent building”, to which the deceased replied in the affirmative conditional upon his being given a fifty-year lease. The witness, who was present, suggested a thirty-year lease, saying that he thought this could be obtained, and the General thereupon requested the deceased to have plans prepared. What the witness described as “beautifully, professionally prepared” plans were later procured and submitted by the deceased, amended and approved by the engineers attached to area headquarters, passed by the medical officer, and signed by another officer, the witness personally seeing the signature. When these steps had been taken the construction of the building was put in hand, the witness himself assisting the deceased to obtain

the materials and watching the building going up, and the work took about four months to complete. A large quantity of cement and some stone were used in the construction, there are good foundations and a corrugated iron roof, the materials employed (apart from labour) costing, in his view, at least £1,000 and, so far from being a temporary erection, the building might be expected to last, he thought, for a hundred years. The entire edifice (including living quarters) is in size some eighty feet by twenty-five feet, containing about four rooms and, after completion, was inspected and passed and then opened in the presence of the General.

The evidence of these two witnesses was given in an impressive manner, neither of them was shaken in cross-examination, and I accept their testimony as true and accurate.

Certain correspondence which is not necessary to set out in detail was put in by consent, ranging over the period from 1942 to 1965 and containing several requests by the deceased and later the defendant, put forward by their advocates, for a measure of security of title in the form of a lease for a period of not less than thirty years, all framed in terms consistent with the evidence given before the Court by Mr. Deakin, followed by replies, first from the army authorities and subsequently the plaintiff, which, while not denying that the deceased had erected the buildings with the permission and encouragement of the military authorities, maintained that the canteen had been intended to serve military personnel only and was not meant to be used for civilian trade and that, in any event, the Army had no power to grant a lease of the premises. The correspondence included at least three separate notices calling upon the deceased or the defendant to deliver up possession of the premises.

At the conclusion of the evidence the following issues were settled at the instance of counsel for the parties:

1. Is the suit wrongly constituted by reason of the fact that the Minister for defence is not a party?
2. Did the so-called "declaration" of July 10, 1918. divest the plaintiff of all his proprietary, possessory and legal rights in or over the suit premises or any part thereof?
3. If not, is the plaintiff now entitled to possession of the suit premises and of every part thereof?
4. Did the plaintiff treat the defendant and his predecessors in title as trespassers on the suit premises since the year 1941?
5. If so, had the defendant's father at the date of his death acquired a right by prescription to the suit premises?
6. Did the plaintiff or the Government of Kenya or the army authorities or any of them at any time encourage the defendant or his predecessors in title to expend money in the erection of permanent buildings on the suit premises?
7. If so, is the plaintiff now estopped by acquiescence from claiming possession of the suit premises?
8. Alternatively to (7) has the defendant acquired an equitable right to the suit premises?

The answer to the first issue is, in strictness, that if, as appears to be the case, the military authorities were, at the date of the filing of the action, lawfully in possession of the suit premises subject to the occupancy of the defendant or other the successors of the deceased the proper person representing those authorities should have been joined either as a plaintiff or as a defendant. Since that time, however, the position has altered for, as the defendant has

conceded, the military authorities ceased to occupy the lands in the year 1964 and are no longer in possession, and in my opinion this development had the effect of rectifying, at least from that time, any defect there may have been in constitution of the suit by reason of the non-joinder of those authorities. The practical answer to this first issue is therefore that, whatever may have been the original position, the suit is not now wrongly constituted by reason of the Minister for the Defence not being a party. I should perhaps add that no suggestion was made to the effect that the Ministry of Health, to whom occupation of the premises was purported to be handed over by the plaintiff on the departure of the army, should have been joined in the proceedings and I have not considered this matter.

Although not raised as an issue, a material question regarding the constitution of the suit arises in relation to the position of the defendant. As already mentioned, the deceased by his will appointed the defendant and another to be his trustees and created for his widow a life estate in all his assets with remainders over. That life estate is still subsisting and so also is the trust, with the result that whatever rights or interest the deceased may have possessed in regard to the suit premises and which did not terminate on his death passed to and became vested in his trustees. It follows, therefore, having regard to the provisions of Ord. VII, r. 8 (2) of the Civil Procedure (Revised) Rules 1948, that, since the defendant has not been sued as a trustee of the will of the deceased and since his co-trustee has not been joined, no relief can be granted in the suit as framed which will adversely affect the estate of the deceased or his trustees as such.

There remains for mention, however, the position of the defendant in his personal capacity, being the capacity in which he has been sued. I am satisfied on the evidence that he is in the sole occupation of one room in the suit premises which has been placed at his disposal by his mother, the life tenant, presumably with the concurrence, express or implicit, of the trustees of whom he is one. He pays no rent and renders no service for his use of this room and he must be regarded therefore as holding it from his mother (or, possibly, from the trustees) either as tenant-at-will, invitee or licensee, distinctions which, for the purpose of this case, are probably immaterial. It is not clear whether in these circumstances the plaintiff is entitled to sue the defendant for possession without joining the life tenant but, as this matter was not raised by the defendant and I did not have the advantage of hearing argument upon it, I propose to assume that the plaintiff is entitled to proceed against the defendant in his personal capacity as he has done but in respect only of such portion of the suit premises as is comprised in the above-mentioned room.

Turning now to the second issue, the so-called “declaration” of July 10, 1918, for reasons already stated, has no legal effect whatever in relation to these proceedings and this issue must be answered in the negative.

As to the third issue, I am satisfied from the evidence of Mr. Yonge that the suit premises have never been the subject of any form of alienation recognized by the Lands Act and that no entry has been inserted with respect to them in the register maintained under that Act. From this it follows that the lands still vest in the Government for an estate in fee simple in possession but subject to any lesser estate, interest or incumbrance, legal or equitable, which is capable of creation without registration and which may have been so created and still subsist.

To the fourth issue, which raises the question as to whether the plaintiff treated the defendant and his predecessors in title as trespassers on the suit premises since the year 1941, the evidence adduced does not enable the answer to this question to be carried back to the year 1941 but it is clear that, at least

since the dispatch of a letter from the plaintiff dated February 6, 1945 to the deceased, which was put in evidence, the plaintiff may be said to have treated the deceased and subsequently the defendant as trespassers on the suit premises.

The fifth issue raises the question as to whether, having regard to the answer to the fourth issue, the deceased can be said to have acquired during his lifetime a prescriptive right to the suit premises. Counsel for the plaintiff contends that the principle of prescription is unknown to Kenya law but he made no attempt to account for the reference to prescription to be found in s. 41 of the Limitation Act (Cap. 11 of the Laws of Kenya, 1948 edition) and I shall assume for the purpose of this case, but without so deciding, that the law of prescription as known in English law is known also to the law of this country. The basis of the title to land by prescription is that where there has been long-continued possession of premises in assertion of a right, the law may presume the right to have had a legal origin, if such an origin was possible, on the hypothesis of a valid freehold title having been granted but of which no evidence now exists, for which purpose the court has been said to have "a great power of imagination". It was implicit in the evidence of Mr. Yonge that, although no entry relating to the premises appears on the register maintained under the Lands Act, the premises are within the field of operation of the Act, and it is clear from the Act that no valid freehold title could have been granted under its provisions without an entry of such grant appearing on the register. Although the first Crown Lands Ordinance was not passed until the year 1902 it is not necessary to consider the possibility of a grant anterior to that time since the defendant has not sought to assert possession by himself or a predecessor in title at any time prior to the commencement of that Ordinance. Upon these grounds I am satisfied that, in view of the non-appearance in the register of any entry supporting such a title and the absence of any suggestion that the register in its present form is incomplete, the defendant has failed to establish a prescriptive title and that this issue must be answered in the negative. I should perhaps add that in dealing with this question I have considered the United Kingdom statute passed in the year 1832 and now known as the Prescription Act on the assumption that this measure may have been included in the "statutes of general application" extended to this country by the East Africa Order-in-Council 1897, but its provisions would not appear to affect the position in this case.

Somewhat analogous to the question of prescription and included among the propositions argued before me although not numbered among the agreed issues is the matter of limitation based on adverse possession. I am satisfied on the evidence that the deceased was in exclusive possession of the suit premises for upwards of twelve years immediately prior to his death and that his widow and other members of his family have remained in possession down to the present time. Basing himself on these facts the defendant relies upon art. 144 of the Indian Limitation Act 1877, and the decisions in *Bejoy Chunder Banerjee v. Kelly Prosonno Mookerjee* (1879), I.L.R. 4 Cal. 327, and *Parameswaram Mum-bannoo v. Krishnan Tengal* (1902), I.L.R. 26 Mad. 535, but the provisions of that article, so far as they have survived the effect of s. 41 of the Limitation Act 1934 (Cap. 11 of the Revised Laws of Kenya 1948), are deprived of any application to the present case by the terms of s. 133 of the Lands Act. In my opinion the defendant cannot successfully rely upon limitation.

In regard to the sixth issue I am satisfied that the army authorities during the year 1942 suggested to the deceased that he should, at his own expense, erect or develop buildings within the area of land occupied by them and that when he accepted their suggestion they actively encouraged him in the project. I am also satisfied that those authorities must have realized that the deceased was expending a substantial amount of money in his undertaking and that he was doing so on the understanding, fostered by them, that he could and would be

given a reasonable measure of security of tenure. I see no reason to doubt the accuracy of the figure of £1,000 mentioned by Mr. Deakin in his evidence as being the minimum figure that would represent the actual cost at that time to the deceased of the materials employed by him (apart from labour), and it is not disputed that the permanent buildings now standing on the lands constituting the suit premises are the buildings so erected or enlarged by the deceased. This issue, therefore, is answered in the affirmative.

The seventh issue raises the question of estoppel and, notwithstanding that I have held the plaintiff's claim against the defendant is maintainable (if at all) only with respect to one room personally occupied by him, it will be convenient to consider this issue in regard to the suit premises as a whole. The defendant, relying upon the facts as found above, contends that the principle of equitable estoppel should be applied by the court to protect him from the relief sought by the plaintiff. It has not been suggested that the legal status of the plaintiff is in itself such as to save or exempt him from the application against him of the principle of estoppel and, subject to the question of relevance with which I will deal directly, in my opinion the defendant's contention as presented to the Court may be said to fall within the first of the two propositions enunciated by Lord Kingsdown, sitting in the House of Lords in *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129, at pp. 170 and 171, where he said:

"The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* (18 Ves. 328), and, as I conceive, is open to no doubt . . .

"If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any Court of law or equity can enforce. This was the principle of the decision in *Philling v. Armitage* (12 Ves. 78), and like the decision in *Gregory v. Mighell*, seems founded on plain rules of reason and justice."

Although Lord Kingsdown did not concur in the ultimate decision of the House in that case there was, as is stated in *Plimmer v. The Mayor, Councillors and Citizens of the City of Wellington* (1884), 9 A.C. 699 at p. 711, no disagreement among the Law Lords on the principles of law involved and his opinion has been frequently adopted, particularly in recent years, as correctly stating the equitable approach to the matter. Illustrations of this may be seen in *Inwards v. Baker*, [1965] 2 Q.B. 29, *Ward v. Kirkland*, [1966] 1 W.L.R. 601, and *E. R. Ives Investments, Ltd. v. High*, [1967] 1 All E.R. 504.

The relevance of these considerations to the circumstances of the present case depends upon the plaintiff being now bound for the purposes of estoppel by the actions of the army authorities by whom the deceased was invited and encouraged to proceed with his venture. This is a question of some difficulty upon which counsel, rather surprisingly, were apparently unable to find any useful authority.

The problem perhaps may best be considered in stages. In the first place it would appear that in the context of the situation existing during the year 1942

and applying so far as relevant the decision in *Nyali Limited v. Attorney-General*, [1957] A.C. 253, the actions of the army authorities to which I have referred, whether those authorities consisted of units of the British army then maintained in Kenya by the United Kingdom Government or locally raised forces such as were maintained under or with the authority of the then Governor and Commander-in-Chief of the Colony and Protectorate of Kenya, must be regarded as the actions of the Crown in its executive, that is, its non-legislative and non-judicial capacity.

Likewise there was vested in the Governor by virtue of s. 6 of the Crown Lands Ordinance (Cap. 140 of the Revised edition of the Laws of Kenya, 1926, as amended), which was in operation during the relevant period down to the coming into force in the year 1950 of the 1948 Revised Edition, power to “grant, lease or otherwise alienate in His Majesty’s behalf any Crown lands for any purpose and on any terms and conditions he may think fit”, while s. 7 declared that all conveyances, leases and licences of or for the occupation of Crown Lands should, unless otherwise provided, be deemed to be made under the provisions of the Ordinance. Section 8 of the Ordinance required the Governor to appoint a Commissioner of Lands to have charge of the administration of the Ordinance, and I have no doubt that the plaintiff is the holder of that post.

The plaintiff asserts, and the defendant does not deny, that the suit premises were at all material times “Crown land”, an expression which, under both the Crown Lands Ordinance contained in the 1926 edition and that contained in the 1948 edition, included by definition

“all public lands in the Colony which are for the time being subject to the control of His Majesty by virtue of any treaty, convention or agreement, or by virtue of His Majesty’s protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever.”

Giving the matter the best consideration that I can I feel bound to hold that on the one hand, the person or authority by whose permission the military forces were in possession or occupation of the suit premises in the year 1942, and those forces themselves, and on the other hand the plaintiff at the date of the filing of the action, must equally be regarded as having in their several ways constituted or represented in relation to this suit “the Crown” in its executive capacity for the purpose of the application, if appropriate on other grounds, of the principle of estoppel which has already been discussed. If this conclusion be correct then it must follow (and the plaintiff has not suggested otherwise) that, despite the disappearance of the Crown from the field of domestic law of this country, the defence of estoppel is still available to the defendant, by virtue of the transitional and other statutory provisions in that behalf, to the same extent as it would or might have been had this hearing taken place prior to such disappearance.

I have already held that, by reason of the manner in which these proceedings have been framed and of the fact that the defendant in his personal capacity has not been shown to be in possession or occupation of more than one room in the suit premises, the plaintiff’s claim is maintainable at best in respect only of that one room. From this it follows that the defence of estoppel need be considered strictly only in relation to that room and, as already indicated, that defence succeeds.

Having regard to the answer to the seventh, the eighth issue does not now arise.

Before concluding this judgment I should, perhaps, deal with one further matter. Had the suit been so constituted as to bring in as defendants the trustees of the will of the deceased (and possibly the life tenant) I would still have been

prepared, on the evidence and arguments adduced and for the reasons which I have endeavoured to express, to hold that the plaintiff has established his right to possession of the suit premises subject to the defence, available to each of the defendants, of estoppel, and if the defendants had raised a counter-claim for a declaration as to their continuing right to remain in possession and occupation of the suit premises I would have been prepared to grant such a declaration to the extent which I shall now indicate. Counsel for the defendant contended, on the strength of the decisions in *Dillwyn v. Llewelyn* (1862), 4 De G. F. & J. 517, and *Ahmad Yar Khan v. Secretary of State for India in Council* (1901), L.R. 28 I.A. 211, that the protection so to be afforded to the defendants should be virtually in perpetuo, but this would appear greatly to exceed the equitable measure of relief to which they could be said reasonably to be entitled and in my view, having regard to all the circumstances, the proper period of suspension of the plaintiff's right to possession would be one of thirty years from June 30, 1942, that being the month during which, according to the deceased's letter of October 13, 1942 which was put in evidence, the erection of the building was completed. Furthermore, to the protection so to be afforded to the defendants it would be reasonable to attach a condition. There are no materials before me which would enable me to determine the quantum of any periodical payment by way of rent proper to be reserved out of the suit premises and in their absence I would not attempt to assess a rent but instead I would feel that the defendants should be required to maintain the premises generally in good order and condition both internally and externally, fair wear and tear excepted and to observe all other obligations as between themselves and the plaintiff usually to be found in a lease of such premises and to deliver up the premises to the plaintiff with vacant possession on June 30, 1972. I mention these matters in order to afford the present parties an opportunity, should they so desire, to terminate this somewhat unsatisfactory litigation upon the lines which I have adumbrated, for which purpose, of course, certain amendments to the pleadings and the formal addition of further parties would be necessary. If the adoption of this course be not mutually desired the action must stand dismissed with costs but without prejudice to such right (if any) as the plaintiff may then have to bring fresh proceedings at any time after June 30, 1972. I will therefore now hear counsel as to their wishes in the matter.

(After hearing counsel, it was ordered:)

Suit dismissed with costs but without prejudice to fresh suit as in last paragraph of judgment. Certificate for Queen's Counsel and junior counsel granted.

For the plaintiff:

K Potter, QC (Special Legal and Constitutional Counsel, Kenya) and *R Elgood* (State Counsel, Kenya)
Attorney-General, Kenya

For the defendant:

C Salter, QC and *JK Winayak*
JK Winayak & Co, Nairobi

Dullo v Shah Meghji Hemraj & Sons
[1968] 1 EA 595 (HCK)

Division: High Court of Kenya at Nairobi

Date of judgment: 26 July 1968
Case Number: 69/1968 (113/68)
Before: Trevelyan J
Sourced by: LawAfrica

[1] Appeal – Proper Registry – Case decided in Mombasa Magistrate’s Court – Whether appeal to be filed in Nairobi High Court registry or in Mombasa District Registry – Meaning of “may” – Civil Procedure Act, s. 65 (1); Civil Procedure (Revised) Rules 1948, O. 46, r. 9 (K.).

Editor’s Summary

In an application filed in the Nairobi High Court Registry for leave to appeal from a decision of the Resident Magistrate’s Court at Mombasa, the respondents took the preliminary point that the application was incompetent because, as the decision sought to be appealed was given in Mombasa, the application could only be made in the Mombasa district registry.

Held – the application was properly made in Nairobi and was not incompetent (dicta of Connell, J., in *Velji Shahmad’s* case (1) and *Storm’s* case (2) and decision of Farrell, J., in *The E.A.P. & L.’s* case (3) not followed).

Preliminary objection overruled.

Cases referred to in judgment:

- (1) *Velji Shahmad v. Shamji Bros, and Popatlal Karman & Co.*, [1957] E.A. 438.
- (2) *P. J. N. Storm v. Central Provision Stores*, [1957] E.A. 579.
- (3) *The East African Power and Lighting Co., Ltd. v. Maweni Estates, Ltd.* (High Court Civil Appeal No. 2 of 1966) (unreported).

Judgment

Trevelyan J: This is an application for leave to appeal out of time. The motion is headed to indicate that it is brought under the proviso to “s. 65 (2)” but the appropriate subsection is (3). The Statute is obviously the Civil Procedure Act (which I shall be referring to as “the Act”).

The respondents take the preliminary point that the application is incompetent on the ground that as the decision sought to be appealed was given in Mombasa, the application can only be made in the Mombasa district registry. The objection is in line with certain dicta of Connell, J. (whom I shall refer to as “the judge”) given in two decisions, *Velji Shahmad v. Shamji Bros. and Popatlal Karman & Co.*, [1957] E.A. 438 (which I shall call “the first case”) and *P. J. N. Storm v. Central Provision Stores*, [1957] E.A. 579 (which I shall call “the second case”). If the opinions which the judge expressed in those cases are correct then the objection must succeed.

The right to appeal is given by s. 65 of the Act which, in so far as I need set it out, provides that:

- “(1) Except where otherwise expressly provided by this Act . . . an appeal shall lie to the High Court . . . (b)

from any other decree . . . of a subordinate court . . . (3) Every appeal shall be filed within a period of thirty days from the date of the decree . . . appealed against . . . Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

Section 81 of the Act provides for the making of rules and in accordance therewith various rules were made one of which is r. 9 of O. 46 of the Civil

Procedure (Revised) Rules 1948 (which I shall refer to as “r. 9”) and which provides:

“An appeal from a decree or order of a subordinate court . . . to the High Court may be filed in the district registry within the area of which such subordinate court . . . is situate; and the district registrar shall (upon the payment to him of all fees) endorse the date of filing upon the memorandum of appeal, and send forward the papers to the registrar of the High Court. The registrar will give such directions for the hearing and disposal of such appeals as he may consider reasonable, having regard to the convenience of the parties and the date at which a hearing can take place.”

I trust that I do not oversimplify and that I do the judge no injustice when I say that, as I understand it, his decisions were based on the interpretation, in r. 9, of the word “may” as “shall”.

In the first case a ruling on costs had been given by a resident magistrate in Nairobi and it was sought to appeal against it in the Kisumu registry of the Supreme Court (as it was then called). In dismissing the appeal the judge *inter alia* said:

“The appeal should have been lodged in Nairobi as being the only registry which has jurisdiction to entertain the appeal.”

which is, of course, in keeping with r. 9. In the second case a judgment had been given in Kisii (and thus within the territorial area of the Kisumu district registry) and it was sought to appeal against it in the Eldoret district registry. The judge held that the appeal was wrongly filed. And so, with respect, it was according to r. 9. In arriving at these decisions the judge thought that the word “may” had a “particular significance”. Indeed in the first case he said that it:

“means one thing and one thing only and that is that any appeal from a subordinate court outside Nairobi must be filed in the appropriate registry”

whilst in the second case he said:

“I have dealt with this precise point in a judgment just delivered . . . in which I came to the clear opinion that the word “may” has a particular significance, quoting various passages in Maxwell on the Interpretation of Statutes (9th Edn.) p. 249: the test laid down in Maxwell which appeals to me most is this:

‘Where the exercise of an authority is duly applied for by a party interested and having the right to make the application, the exercise depends upon proof of the particular case out of which the power arises.’

I would go even further and I would say that where there is an enabling section allowing the exercise of a power or an authority that power or authority must be exercised in the manner contemplated by the statute: the statute in my opinion allows appeals from subordinate courts to be filed in the district registry within the area of which subordinate court is situate . . .”

I have a healthy regard for the doctrine of judicial precedent and I might have been unable to muster sufficient courage to disregard the judge’s views were it not that not only am I convinced that the word “may” in r. 9 “confers a licence or privilege on the would-be appellant” but my brother Farrell, J., when the decisions were referred to him in the case to which I shall be turning, only felt constrained not to disregard them because they had stood unchallenged for some eight years. It is true that there is no rule which in terms says that an

appeal in a case such as is now before us may be lodged either in Mombasa or in Nairobi, but in my view that is what r. 9 provides. Moreover, in considering the judge's approach to the matter of interpretation one must ever bear in mind that it is s. 65 of the Act which gives the right to appeal. Rule 9 which the judge appears, I think, to have interpreted as it were in isolation from the other rules is in that Part of the 1948 Rules which is headed "District Registries" whilst the Part headed "Appeals" commences with O. 41, r. 1 (1) which begins:

"Every appeal to the High Court shall be preferred . . ." with no restriction as to where an appeal may be lodged so that r. 9 must surely confer a power and not restrict. Its tenor makes it, as I think, clear that the registrar of this Court has what I would term the administrative control over appeals. Farrell, J., was, if I may respectfully say so, somewhat doubtful if not critical of the judge's decisions. In the unreported case of *The East African Power and Lighting Co., Ltd. v. Maweni Estates, Ltd.* (this Court's Civil Appeal No. 2 of 1966) he had this to say about them:

"If those decisions are right, there appears to be no valid answer to the objection made by the respondent. But with great respect to Connell, J., I should have thought the matter was not as plain as he appears to have found it. Appeals are the subject of O. 41 and the rule under consideration belongs to a later Order, dealing with district registries. If it had been intended to lay down that in every case appeals must be filed in the appropriate district registry it might have been provided in O. 41. In fact what is found in r. 1 (1) of that Order is a provision that 'every appeal to the Supreme Court shall be . . . presented to the Court or to such officer as it shall appoint in that behalf'. In the absence of any more detailed provision, it would seem reasonable to construe the provision as meaning that in the ordinary case appeals should be presented to the Central Office. Such being the general rule, it would not be unnatural if, in the order dealing with district registries, the principle of centralisation were to be relaxed by allowing appeals from courts in outlying districts to be filed in a district registry. The reason which led Connell, J., to the opposite view was the test laid down in Maxwell on the Interpretation of Statutes (11th Edn.), at p. 234, viz., 'whether there is anything that makes it the duty of the person on whom the power is conferred to exercise that power'. But with respect it would seem more natural to construe the provision not as conferring a power on the district registrar, but as conferring a licence or privilege on the would-be appellant."

With respect I agree with that entirely. Farrell, J., went on, however, to say:

"However that may be, the decision of Connell, J., has stood unchallenged for over eight years, and I should require to be more firmly persuaded than I am before I should consider myself justified in disregarding it."

I have, of course the advantage of having before me the views of my brother Farrell but there is also this, that not all of the judge's opinions, though necessary to indicate how his mind was working, were required to decide the cases. In the first case, as I said, a Nairobi decision was sought to be appealed in Kisumu and in the second case a Kisii case was sought to be appealed in Eldoret. In the instant case the facts are yet different for it is a Mombasa decision which it is sought to challenge in Nairobi.

In my view, then, the application was properly made and is not incompetent. As I am satisfied that good and sufficient cause has been established for admitting

the appeal out of time I so admit it. I was not addressed on costs, which I reserve.

Appeal admitted.

For the appellant:

DN Khanna

Khanna & Co, Nairobi

For the respondent:

CZ Shah

Sharma & Shah, Mombasa

Abeid v Badbes
[1968] 1 EA 598 (HCK)

Division:	High Court of Kenya at Mombasa
Date of judgment:	18 March 1968
Case Number:	172/1967 (118/68)
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Civil Practice and Procedure – Notice – Giving of notice – Form of notice – Regulations differing from Act – Validity of notice – When “given” or “received”.

[2] Rent Restriction – Notice – To terminate tenancy – Variation between wording of Act and wording of Regulations made thereunder – Notice not following Act but in form prescribed by Regulations – Whether notice valid – Whether Regulations directory or imperative – Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 1965, s. 4; Landlord and Tenant (Shops, Hotels and Catering Establishments) Regulations 1966, reg. 4, and Form “A” in Schedule (K.).

[3] Statute – Notice – Regulations – Variation between wording of Act and form of notice prescribed by Regulations made thereunder – Whether notice not following wording of Act but in prescribed form valid.

Editor’s Summary

A tenant of a protected tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 1965, on being served with a notice terminating his tenancy, by letter informed the landlord that he did not agree to the tenancy being terminated. The tenant, however, failed to refer the matter to the Rent Tribunal as required by s. 6 (1) of the Act. The main defence in the High Court to the landlord’s action for possession and mesne profits was that the landlord’s notice, although it was in

accordance with Form “A” prescribed in the Schedule to the Regulations issued under the Act, was defective because it was different from the wording of s. 4 (3) of the Act. Form “A” in the Schedule to the Regulations in para. (2) requires the tenant within two months after *receiving* the notice to notify the landlord in writing whether he is willing to give up possession; whereas the wording regarding the notice in s. 4 (3) of the Act itself speaks of a notice that has to be *given*. The main point raised was that the word “giving” and not “receiving” of the notice should have been used in the notice.

Held – The notice was valid because it contained all that was required under the Act and the Regulations, which were directory. Although there was a variation between the wording in the Form “A” in the Regulations and the Act itself, the form was not ultra vires the Act.

Judgment for the plaintiff with costs.

Cases referred to in judgment:

- (1) *Warburton v. Loveland* (1831), 2 Dow. & Cl. (H.L.) 480; 6 E.R. 806.
- (2) *R. v. Appeal Committee of County of London Quarter Sessions, ex parte Rossi*, [1956] 1 All E.R. 670.
- (3) *R. v. Lincolnshire Appeal Tribunal, ex parte Stubbins*, [1917] 1 K.B. 1.

[**Editorial Note:** By Legal Notice No. 31 of 1968 Form “A” has now been amended.]

Judgment

Mosdell J: This is a suit by the plaintiff to evict a tenant from furnished premises on plot 335 of s. 19, Mombasa. There is no dispute that the defendant was a monthly tenant of the plaintiff at a rent of Shs. 620/- per month or that the tenancy is protected by the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act No. 13 of 1965 (hereinafter called “the Act”). By a notice in writing dated February 23, 1967 served by the plaintiff on the defendant the plaintiff terminated the tenancy and required the defendant to quit the premises on April 30, 1967. By letter dated March 21, 1967 the defendant informed the plaintiff that he did not agree to the termination of his tenancy. The defendant, however, failed to refer the matter to the Tribunal within the time limited by s. 6 (1) of the Act, or indeed at all. The defendant has not vacated the premises. In addition to an order for possession the plaintiff now claims mesne profits from May 1, 1967 to the date of delivery of possession and costs. The defendant contends that he is protected by the Act and in his amended defence, paras. 3 and 4, states:

- “3. The defendant will further contend that he is protected under the said Act 13 of 1965 and the plaintiff does not have any cause of action under the said Act and/or the plaintiff’s suit is misconceived.
- “4. With regard to para. 5 of the plaint the defendant does not admit the validity of the notice referred therein. The defendant contends:
 - (i) that the said notice is invalid in law and ineffective because it did not comply with s. 4 (3) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act No. 13 of 1965, in that, it did not require the defendant (tenant) within one month after the giving of the said notice to notify the plaintiff (landlord) in writing whether or not the defendant (tenant) would agree to give up possession of the premises comprised in the tenancy;
 - (ii) that this Hon’ble Court has no jurisdiction to order possession as the defendant is protected under the aforesaid Act.”

As I understood Mr. Pandya, for the defendant, he is alleging that the notice to quit given by the plaintiff to him is defective in that it does not follow the wording set forth in Form A contained in the Schedule to the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) Regulations 1966, Legal Notice 19 of 1966 (hereinafter called “the Regulations”) promulgated by the Minister of Commerce, Industry and Co-operative Development under ss. 4 and 16 of the Act. Section 4 of the Act reads as follows:

- “(1) A landlord wishing to terminate a tenancy, or wishing to terminate or alter the terms and conditions of a tenancy or the rights or services enjoyed by a tenant under a tenancy shall give notice thereof to the tenant in such form as the Minister may, by regulations made under this Act,

prescribe, and notwithstanding anything contained in any written law or in the terms and conditions of such tenancy no tenancy shall terminate or be terminated by the landlord, and the terms and conditions of a tenancy or the rights or services enjoyed by the tenant under a tenancy shall not terminate or be terminated or altered by the landlord, unless notice is given to the tenant in accordance with the provisions of this section or unless the parties to the tenancy so agree in writing.

“(2) A notice under the provisions of sub-s. (1) of this section shall not take effect until a date to be specified in such notice which shall not be less than two months after the date of service of such notice:

“Provided that –

“(a) the date of termination specified in a notice of termination of a tenancy shall not be earlier than the earliest date on which, but for the provisions of this Act the tenancy would have terminated, or could have been brought to an end by notice to quit given by the landlord on the date of service of the notice given under this section;

“(b) the period of notice given under this section shall not be less than the period of notice which may be required under the terms of the tenancy; and

“(c) the parties to the tenancy may agree in writing to a lesser period of notice.

“(3) A notice under this section shall be of no effect unless it specifies the grounds on which the landlord seeks such termination or alteration, and it requires the tenant within one month after the giving of such notice, to notify the landlord in writing whether or not the tenant agrees to give up possession of the premises comprised in the tenancy, or agrees to the proposed termination or alteration of the terms and conditions of the tenancy or the rights or services enjoyed by him under the tenancy as the case may be.

“(4) A notice to a tenant required to be given under this section, may be served by delivering it to him personally, or to an adult member of his family, or to his servant residing with him, or to his employer, or by sending it by prepaid registered post to his last known address, and any such notice shall be deemed to have been served on the tenant on the date on which it was delivered as provided in this subsection or on the date on which the registered letter would in the ordinary course of post have been delivered.”

Regulation 4 of the Regulations reads as follows:

“A notice under s. 4 (1) of the Act by a landlord shall be in Form A in the Schedule to these Regulations.”

Form A in the Schedule to the Regulations reads as follows:

“SCHEDULE

FORM A

Landlord’s Notice to Terminate or Alter Terms of Tenancy (Section 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 1965)

To of

.....

being tenant of premises known as

.....

1. I of

.....

the landlord of the above-mentioned premises, hereby give you Notice terminating/altering terms/altering conditions/of your tenancy with effect from the

..... day of 19.....

2. You are required within two months after receiving this Notice to notify me in writing whether or not you will be willing to give up possession of the premises/agree to alteration of terms/conditions of the tenancy as from that date.

3. I hereby append the grounds upon which this Notice is based:

(Reasons and/or new terms/conditions to be given on a separate sheet)

4. This Notice is given under the provisions of s. 4 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 1965.

Dated this day of 19

Signed

Landlord”

The word “two” was a printer’s error and was changed to “one” by a corrigendum in the *Kenya Gazette Supplement* No. 27 dated April 5, 1966. The notice given by the plaintiff to the defendant is dated February 23, 1967 and reads as follows:

“We have been instructed by Mr. Awadh Abeid the registered proprietor of plot No. 335, s. 19, Mombasa to refer to the previous correspondence exchanged in this matter and to give you notice which we hereby do that you do quit vacate and hand over vacant possession of the above premises on April 30, 1967.

“The grounds on which our client seeks to terminate your tenancy as aforesaid are as under:

- (a) you have committed a breach of your obligations under the tenancy in that you have sub-let portions of the premises let to you by our client to three different persons without the consent of our client; and
- (b) our client intends to occupy the premises himself for a period of not less than one year for the purpose of carrying on business of a restaurant and tea-stall.

“In terms of s. 4 (3) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act 1965, you are hereby required within one month of the date of the receipt of this letter to notify us on behalf of our client in writing whether or not you agree to the termination of your tenancy.

“Should you fail to do so, our instructions are to proceed further against you in this matter, holding you responsible for all costs and consequences.”

Mr. Pandya submits that the plaintiff should have used the exact words set forth in s. 4 (3) of the Act and the Regulations and that he failed to do so in two respects.

Firstly the landlord’s advocates stated: “you are hereby required within one month of the date of *the receipt* of this letter to notify us . . .” instead of stating: “you are hereby required within one month after the giving of this notice to notify us . . .”

Secondly they stated: “to notify us on behalf of our client in writing whether or not you agree to *the termination of your tenancy*” instead of writing: “to notify us on behalf of our client in writing whether or not you agree to *give up possession* of the premises comprised in the tenancy”.

Mr. Pandya was at pains to show that the provisions of the Act were mandatory. Mr. Inamdar, for the

plaintiff, did not, nor does this court, cavil with

this submission. To quote but one of the authorities cited by Mr. Pandya, namely, Odgers' Construction of Deeds and Statutes (4th Edn.), at p. 186:

"VIII. Statute if clear must be enforced. If the language of a statute is clear, it must be enforced though the result may seem harsh or unfair and inconvenient. It is, again, only when there are alternative methods of construction that notions of injustice and inconvenience may be allowed scope."

and the words of Tindal, C.J., in *Warburton v. Loveland* (1831), 2 Dow. & Cl. (H.L.) at p. 489, quoted at p. 187 op cit.:

"Where the language of an Act is clear and explicit we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."

Of course the clear language of a statute must be complied with. But, submitted Mr. Inamdar, that does not necessitate the slavish adherence to the words used in the statute or in the form contained in Regulations made under the statute, if the provisions of the Statute in question and the requirements of such Regulations be complied with, albeit by means of the use of different words. Indeed, were Mr. Pandya's thesis to be carried to its logical conclusion, a document would have to be held invalid were the "i's" not dotted or the "t's" not crossed.

The intention of s. 4 and the following sections of the Act is quite clear. It is to protect tenants of properties covered by the Act. Such protection is afforded to such tenants by enabling them to oppose any proposed determination of their tenancy or any proposed termination or alteration of the terms and conditions of their tenancy or the rights and services enjoyed by them under their tenancy, as the case may be, and to refer the matter to a Tribunal appointed under the Act. It is significant, in my opinion, that in the Act itself the words "give notice" and "serve a notice" are used synonymously (vide e.g., ss. 4 (4), 5 (2) and (3), 6 (1) and 7 (1) of the Act). The gravamen of Mr. Inamdar's submissions was that, in any case, the word "give" implies "receive" by the donee and, *inter alia*, he quoted the definition of the word "give" in The Shorter Oxford Dictionary (3rd Edn.), p. 795 as meaning "deliver" or "hand over". Something is not "given" until it is "received" he submitted. Mr. Inamdar also cited *R. v. Appeal Committee of County of London Quarter Sessions, ex parte Rossi*, [1956] 1 All E.R. 670. This was a case in which Rossi applied to the Court of Appeal for an order of certiorari to bring up and quash an order made by Quarter Sessions on the ground that although notice of the date fixed for the hearing of the appeal had been sent to Rossi by registered post pursuant to s. 3 (1) of the Summary Jurisdiction (Appeals) Act 1933, yet notice had not been given to him within that enactment and s. 26 of the Interpretation Act 1889, as the letter of notice had been returned undelivered. It was held by the Court of Appeal that an order of certiorari should be granted because notice had not been given to Rossi within s. 1 (3) of the Summary Jurisdiction (Appeals) Act 1933, as the notice had not been received by Rossi and having been returned through the post, was not deemed by virtue of s. 26 of the Interpretation Act 1889 to have been given. The facts of this case are unimportant, for present purposes, but the case is interesting by reason of the observations of Morris, L.J., and Parker, L.J. as to the "giving", "serving" or "sending" of a document by post. Section 26 of the Interpretation Act 1889 is repeated in Kenya law in s. 3 (5) of the Interpretation and General Provisions Act, Cap. 2, and reads as follows:

"Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve'

or the expression 'give' or 'send', or any other expression is used, then, unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

Section 3 (1) of the summary Jurisdiction (Appeals) Act 1933 reads as follows:

"A notice required by this sub-section to be given to any person may be sent by post in a registered letter addressed to him at his last or usual place of abode."

In the judgment of Parker, L.J., there is this to be found ([1956] 1 All E.R. at pp. 681–682):

"Turning again to s. 3 (1) of the Act of 1933, the clerk of the peace is to 'give notice' which contemplates not merely a written notice but an oral notice, and if the matter rested there, I think it is reasonably clear that the notice is to be delivered, and delivered in time to enable the party concerned to prepare for and attend the hearing. Much reliance is, however, placed on the concluding sentence which provides for the notice being 'sent'. That, however, is only providing a further method by which the clerk of the peace may 'give notice' and cannot alter the nature of the obligation itself. Further, it is, I think, important to appreciate the object of the notice. The appeal to the appeal committee is in every sense a re-hearing. It is for the complainant who has lost her case below to begin, and to call her evidence afresh. The respondent to the appeal, who has won below, ought, one would think, to be put into a position to appear and resist the case on the re-hearing if he so desires. So far as the original hearing before petty sessions is concerned there is an elaborate code laid down to ensure that the party against whom the complaint is made should have a full opportunity of appearing: cf., the Magistrates' Courts Act 1952, ss. 45, 46 and 47. It would be odd if s. 3 (1) of the Act of 1933 had to be construed so as to put him in a less favourable position in an appeal. I think that the obligation expressed by the words 'shall in due course give notice' means in its context 'shall cause notice to be received in a reasonable time to enable the party concerned to prepare for and attend the hearing'."

All this is eminently reasonable but the real question here, as submitted by Mr. Pandya, is – Is reg. 4 of the Regulations imperative or directory? If the former, then Mr. Pandya's submissions must carry the day. If on the other hand reg. 4 is directory only, then Mr. Inamdar's submissions must succeed.

For some reason or other authority on this point is extraordinarily sparse. Neither Mr. Pandya nor Mr. Inamdar could cite me an authority directly in point. My own researches have led me to no local case on the topic but I found the English case of *The King v. Lincolnshire Appeal Tribunal, ex parte Stubbins*, [1917] 1 K.B. 1 in which Mr. Stubbins, apart from being a J.P., was the chairman of the Winterton Urban Council and of the Winterton Local Tribunal to which application could be made for exemption from military service. I make no apology for quoting the head note to this case in full:

"By the Second Schedule to the Military Service Act 1916, any person aggrieved by the decision of a local tribunal, and any person generally or specially authorised to appeal from the decision of that tribunal by the Army Council, may appeal against the decision of a local tribunal to the appeal tribunal of the area.

By reg. 19 in Part I., Section II., of the Schedule to the Military Service (Regulations) Order 1916, 'any person aggrieved by a decision of the local

tribunal . . . and the military representative . . . may appeal to the appeal tribunal for the area, against the decision of the local tribunal, by delivering to the local tribunal in the prescribed form, in duplicate, notice of appeal not later than three clear days after the decision of the local tribunal, or within such extended time as, for good reason shown, the local tribunal may allow. The local tribunal shall thereupon, send to the other party to the application the duplicate notice of appeal.

On February 23, 1916, a local tribunal granted the applicant total exemption from military service.

The military representative immediately announced in the presence and hearing of the applicant that he would appeal, at the same time stating his grounds. On February 26, 1916, no copies of the prescribed form of notice of appeal being available, the military representative handed to the clerk of the local tribunal a list of the names of the persons in respect of whom he intended to appeal, including the name of the applicant; and some weeks before the appeal was heard the clerk discussed the matter with the applicant.

Notwithstanding an objection by the applicant that they had no jurisdiction to hear it, upon the ground that the prescribed notice had not been given, the appeal tribunal allowed the appeal:

Held by Lord Reading, C.J. and Avory, J. (Low, J. dissenting), that, inasmuch as the applicant knew within the prescribed time that the appeal was pending, strict compliance by the military representative with the letter of reg. 19 by delivering to the local tribunal notice of appeal in the prescribed form in duplicate was not a condition precedent to the appeal tribunal having jurisdiction to hear and determine the appeal, and that therefore a rule nisi obtained by the applicant for a certiorari to bring up the order of the appeal tribunal to be quashed on the ground of want of jurisdiction must be discharged.

Observations upon the judicial character of military tribunals.

Held by the Court of Appeal, that the statute gave an absolute right of appeal; that the provisions of reg. 19 as to procedure were directory only and not imperative, and that non-compliance with them had not deprived the military representative of his right of appeal.”

In his judgment Lord Reading, C.J., said this ([1917] 1 K.B. at pp. 8 – 10):

“The whole question depends upon the view we take of reg. 19. Speaking for myself, I am satisfied that the object of this regulation was to ensure that it should be brought (within three days unless an extension of time is granted) to the knowledge of the person affected that there is to be an appeal against the decision in his favour. In the present case it is clear that the knowledge was brought to the mind of the applicant, but not ‘in the prescribed form, in duplicate’, within the strict letter of the regulation. In my judgment it is not necessary to comply with the letter when there is a compliance with the spirit of the regulation. There is no reason apparent to me why the jurisdiction of the appeal tribunal should not be exercised when in fact the whole object of the regulation has been safeguarded. Doubtless it was intended by the regulations to prevent controversy arising as to whether notice of appeal had been given or not by providing that the notice is to be given in a prescribed form in duplicate, which involves its being given in writing; but when once it is an admitted fact that the applicant knew within the requisite time, it seems to me that it would be straining the law to say that such a technical compliance with the very words of this regulation as the applicant contends is necessary is a condition precedent to the exercise by the appeal tribunal of its jurisdiction. Consider what the effect would be if we were to hold that this technical compliance was a condition precedent. The ‘prescribed form’, apparently, did not exist at Winterton. Presumably the military representative did not know what the form was; at any rate, he did not know it by heart and had not one available. If he had written words in the

form of a letter or on a piece of paper to the effect that he intended to appeal from the decision and had handed it in duplicate to the clerk, could it then have been said that the appeal tribunal had no jurisdiction? If we were to apply the letter as strictly as has been suggested on behalf of the applicant, this Court would be bound to say that the appeal tribunal would still have no jurisdiction because the words in the regulation 'in the prescribed form' had not been complied with. Again, suppose the military representative had handed in a notice of appeal in the prescribed form but not in duplicate, and the local tribunal had thereupon made out a duplicate and had sent it to the applicant, if the contention on the applicant's behalf is right, it would follow that the appeal tribunal would have no jurisdiction because the military representative when giving his notice of appeal within the three days had not delivered it in duplicate. It appears to me that so to hold would be a mere slavish adherence to the exact words of the regulations without appreciating that they are made in order that there should be due notice given, and consequently I am unable to come to the conclusion which Mr. Emery on the applicant's behalf asks me to come to. There is no grievance on the merits, and in spirit the regulation has been complied with, although it may be true that in the letter there has been failure to observe the provisions."

In the instant case the notice given by the plaintiff contained all that was required substantively both by the Act and the Regulations and the contentions of the defendant here appear to me as devoid of merit as were those of Mr. Stubbins in *R. v. Lincolnshire Appeal Tribunal*. In my view the plaintiff by using the expression "within one month of the date of the receipt of this letter" conveyed the same meaning as would have been conveyed had he used the words "within one month of the date of the giving of this letter" or "within one month of the giving of this letter".

Similarly by using the words "whether or not you agree to the termination of your tenancy" the plaintiff conveyed precisely the same meaning as he would have conveyed had he written "whether or not you agree to give up possession of the premises comprised in the tenancy".

It was submitted by Mr. Pandya, in passing, that cl. 2 of the Form A was ultra vires the Act because the word used therein was "receiving" and not "giving". The form was, indeed, changed by the Landlord and Tenant (Shops, Hotels and Catering Establishments) (Tribunal) (Forms and Procedure) (Amendment) Regulations 1967, Legal Notice 31/68 and, *inter alia*, the word "giving" substituted for "receiving". It was also suggested by Mr. Pandya that this alteration was made largely as the result of the judgment of the Tribunal in cases Nos. 56/67, 120/66 and 121/66 (consolidated) with a copy of which he kindly provided me. With due respect to the Tribunal, for the reasons I have endeavoured to express herein, I cannot agree with their decision in which it was held that as the words "after the receipt of this notice" were used instead of the words "after the giving of this notice" the notice did not comply with the Act and hence was invalid. Nor can I agree that Form A in its original form was ultra vires the Act. In my view, provided the notice given under the Act contains all that is required by the Act and the Regulations made thereunder there has been a sufficient compliance with both the Act and such Regulations. This in my view is the position in the instant case. I hold reg. 4 of the Regulations to be directory and not imperative. To hold otherwise would entail enslavement to technicality from which the public began to be freed by the Common Law Procedure Act 1852 and from which they have been made progressively freer ever since. I, therefore, overrule Mr. Pandya's objections and give judgment for the plaintiff as prayed with costs.

Judgment for plaintiff.

For the plaintiff

IT Inamdar

Bryson, Inamdar & Bowyer Mombasa

For the defendant:

KM Pandya

Sachdeva & Co, Mombasa

Lone v Patel
[1968] 1 EA 606 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	19 October 1966
Case Number:	86/1966 (121/68)
Before:	Harris J
Sourced by:	LawAfrica

[1] *Civil Practice and Procedure – Caveat – Application for removal of caveat lodged under Registration of Titles Act – Correct procedure by summons not by originating summons – Registration of Titles Act (Cap. 281), s. 57 (1) and (5); Civil Procedure (Revised) Rules 1948, O. 36; Crown Lands Act (Cap. 280), s. 116 (5) (K.).*

[2] *Land Registration – Caveat – Removal of – Proper procedure for application for – Registration of Titles Act (Cap. 281), s. 57 (1) (K.).*

Editor’s Summary

Proceedings for the removal of a caveat under s. 57 (5) of the Registration of Titles Act should correctly be commenced by a summons, and not by an “originating summons”.

Cases referred to in judgment:

- (1) *Hirani and Others v. Pankhanis and Another* (Kenya High Court Miscellaneous Civil Case No. 72 of 1960) (unreported).
- (2) *Kuhlmann v. E. K. Banks Ltd.* (Kenya High Court Miscellaneous Civil Case No. 82 of 1964) (unreported).
- (3) *Henfrey v. Bridge* (Kenya High Court Miscellaneous Civil Case No. 12 of 1966) (unreported).

Judgment

Harris J: This is an application by one Mohamed Siddiq Lone, the proprietor of premises known as L.R. number 209/5044 South “C” in the city of Nairobi, for an order requiring the respondent, Mohanlal G. Patel, to show cause why a caveat lodged by the latter under the Registration of Titles Act against the title to the premises should not be withdrawn. In the proceedings the applicant has been referred to as

“the plaintiff” and the respondent as “the defendant”, and as a matter of convenience I shall adhere to those terms.

It appears that in the year 1964 the defendant contracted to purchase the premises from the plaintiff and paid a deposit, but the sale fell through and the deposit was forfeited. The plaintiff has now agreed to sell the premises to a third party but finds that the defendant has lodged a caveat against the title with the result that, until its removal, the completion of the sale to the new purchaser is held up. The application is not seriously contested on the merits, but the defendant has raised by way of preliminary objection a question of procedure. Counsel for each party has requested the court to give a considered ruling as a guide for the future in view of the present uncertainty arising from a number of conflicting decisions, and the court is indebted to them for their helpful arguments.

The proceedings have been initiated by means of a summons issued out of the High Court registry at Nairobi and intituled “Miscellaneous Cause No. 86 of 1966. In the matter of the Registration of Titles Act and in the matter of a caveat over L.R. 209/5044 ‘South C’ Nairobi”, followed by the names of the parties. It is headed “Summons: s. 57 (5) Registration of Titles Act, Cap. 281”, and requires “all parties to attend the Judge in Chambers” on the hearing of the application.

The correct course, according to the defendant, would have been to proceed by way of an “originating summons”, brought presumably under O. 36 of the Civil Procedure (Revised) Rules 1948, for the reason that, since there are no proceedings already in existence, the only form of summons by which proceedings may properly be commenced is an originating summons. Support for this submission is to be found in the unreported case of *Hirani and Others v. Pankhanis and Another* (Misc. C.C. No. 72 of 1960) where, by an order dated July 11, 1960, Pelly Murphy, J., dismissed an application for the removal of a caveat under the Crown Lands Ordinance on the ground that it was brought by a chamber summons. Giving his reasons the learned Judge said:

“In my opinion the application is not brought before the court in any proper form. Such an application must either be by originating summons or a summons in a pending suit. The ‘chamber summons’ herein is neither. It should not have been accepted in the registry.”

The subsequent practice, however, appears not always to have followed this injunction. In each of two later unreported cases of *Kuhlmann v. E. K. Banks Ltd.* (Misc. C.C. 82 of 1964), which was a decision of Miles, J., relating to a caveat lodged under both the Crown Lands Act and the Registration of Titles Act, and *Henfrey v. Bridge* (Misc. C.C. 12 of 1966), which was a decision of Farrell, J., relating to a caveat lodged under the Crown Lands Act alone, a summons, not issued in a pending suit and not constituting an originating summons under O. 36, was accepted by the registry and proceeded upon without objection, no reference being made to *Hirani’s* case. It is this conflict in procedure which the parties in the present case wish to have resolved.

Sub-section (1) of s. 57 of the Registration of Titles Act empowers any person (called, in the Act, the caveator), who is claiming the right, whether contractual or otherwise, to obtain in any land a defined interest capable of creation by an instrument registrable under the Act, to lodge in the appropriate registry a caveat forbidding the registration of any dealing with the land. Sub-section (5) of the same section provides that:

“The proprietor or other person claiming land may, by summons, call upon the caveator to attend before the court to show cause why the said caveat should not be withdrawn, and it shall be lawful for the court, upon proof that the caveator has been summoned, and upon such evidence as the court may require, to make such order in the premises, either *ex parte* or otherwise, as to the court shall seem fit; and, where a question of right or title requires to be determined, the proceedings shall be as nearly as may be in conformity with the rules of the court in relation to civil causes.”

In contrast to the position in England where, by definition, an “originating summons” for the purpose of the Rules of the Supreme Court means every summons other than a summons in a pending cause or matter, the term “originating summons” is used in this country in a more specific sense, as in the Guardianship of Infants Rules, in s. 81 (2) (g) of the Civil Procedure Act and in O. 36 of the Civil Procedure (Revised) Rules 1948, in the latter of which it is employed to describe the type of summons required to be adopted for the purpose of seeking any of the specific forms of relief obtainable under that Order. The relief allowed under sub-s. (5) of s. 57 of the Registration of Titles Act does not fall within the categories set out in O. 36, nor is the procedure envisaged by the sub-section in any way similar to that provided for in the Order, and I can see no ground for holding that the sub-section was intended to have the effect of adding the removal of caveats to the types of relief that may be obtained under the Order. In my opinion it would have been incorrect to have commenced the present proceedings by way of an originating summons

under O. 36, and would have been misleading, if not actually incorrect, to have headed the summons with the words “originating summons” as suggested by the defendant, if the proceedings were not being brought under O. 36.

With regard to the proposition that, if not an originating summons, the summons herein could have been properly issued only in an existing suit, this approach appears to overlook the distinction between the earlier practice relating to caveats and the present practice. Prior to the insertion, by s. 31 of the Crown Lands (Amendment and Miscellaneous Provisions) Ordinance 1959, of the new s. 143 (now re-numbered 116) in the Crown Lands Act, the former s. 143 enabled the proprietor of lands affected by a caveat lodged under that Act to compel its removal only by an action before some competent court. The evident purpose of the amendment to the former s. 143 was to enable the removal of such a caveat to be secured by means of proceedings commenced by summons instead of proceedings in the nature of an action, with the result that, so far as relates to the Crown Lands Act, the suggestion that a summons under what is now s. 116 (5) could properly be issued only in an existing suit would be difficult to support. By analogy, since the relevant provisions of the new s. 116 (5) of the Crown Lands Act and those of s. 57 (5) of the Registration of Titles Act, under which the present application is brought, are identical, the same reasoning applies to a summons under the latter sub-section.

As to whether the summons in the present case was appropriately described on its face merely as a “summons”, as in both *Kuhlmann’s* case and *Henfrey’s* case, or could more properly have been headed “chamber summons” as was done in *Hirani’s* case, I think little need be said. Both a “chamber summons”, so called, and an originating summons under O. 36 are in fact heard by a Judge in chambers unless adjourned by him into court, and, except in the case of a summons for final disposal in a subordinate court under O. 5, rr. 3 and 5, the very word “summons” appears to predicate a hearing in chambers. Possibly it is for this reason that no question seems to have arisen, either in this or any of the earlier cases, as to the propriety of applications by summons, calling upon a caveator “to attend before the court to show cause”, being heard in chambers instead of in open court. However that may be, there can be no doubt as to the convenience of the present practice of listing all applications for the withdrawal of caveats in chambers, the Judge being empowered under O. 50, r. 10, to adjourn into court any such application as he considers might be more conveniently dealt with in court than in chambers.

For the reasons which I have stated I am of the opinion that the preliminary objection must be disallowed and, since the defendant had failed to show cause why the caveat should not be withdrawn, I direct that an order do issue for its withdrawal forthwith. The plaintiff will have his costs of and incidental to the application.

Order accordingly.

For the plaintiff:

SM Akram

Akram & Esmail, Nairobi

For the defendant:

Satish Gautama

BD Bhatt, Nairobi

Republic v Ismael
[1968] 1 EA 609 (HCT)

Division: High Court of Tanzania at Arusha
Date of judgment: 11 April 1968
Case Number: 1/1968 (123/68)
Before: Platt J
Sourced by: LawAfrica

[1] Criminal Law-Affray – Ingredients of offence-only two accused – One pleads guilty – Other later tried and acquitted – Whether conviction vitiated – Correct procedure as to plea in such a case – Penal Code, s. 87 (T.).

Editor’s Summary

A and B were jointly charged with affray contrary to s. 87 of the Penal Code. A pleaded guilty, but B pleaded not guilty and was subsequently tried and acquitted. At the trial B claimed she had been the victim of assault by A. On revision:

Held –

- (i) the word “fight” in s. 87 implies a combat of two or more persons;
- (ii) if B was not guilty of taking part in a fight, then A’s actions in assaulting her were not an affray but an assault;
- (iii) the conviction was unsound.

Observations obiter: where one of two accused charged with affray pleads not guilty and the other pleads guilty a plea of not guilty should be entered for both.

Conviction quashed.

Case referred to:

(1) *Sharp and Johnson v. R.* (1957), 41 Cr. App. Rep. 86.

No appearance for either party.

Judgment

Platt J: This matter arises out of proceedings of the Urban Primary Court of Moshi and the District Court of Kilimanjaro, having been sent to this Court by the learned Supervisory Magistrate in Moshi under s. 26 (2) (a) of the Magistrates’ Courts Act (Cap. 537).

On February 12, 1968, one Shabani Ismael was jointly charged before the primary court with one

Tabu Salimu with the offence of affray. Shabani pleaded guilty while Tabu denied the charge. The primary court then heard an outline of the facts by the prosecution and this having been admitted by Shabani and clearly supporting the charge of affray, convicted Shabani and sentenced him to three months' imprisonment. A date for the trial of Tabu was then set. Before the trial, Shabani appealed to the district court on February 22, 1968, but his appeal was dismissed. On March 21, 1968, the trial of Tabu was commenced and three witnesses testified for the prosecution, but in each case, though there was evidence that there must have been a quarrel, none of the witnesses actually saw the fight. According to one witness, Tabu explained that Shabani had assaulted her. At the end of the prosecution case, the primary court, in agreement with the assessors, decided that there was no evidence of a fight or that Tabu had taken part in a fight, the only evidence being that she claimed to be the victim of an assault and so held that there was no case for Tabu to answer. She was then acquitted. Arising out of this acquittal, the supervisory magistrate sent the proceedings against Shabani in the primary court and the district court to this court for revision, as he was of the opinion that Shabani had been wrongly convicted of affray.

The offence of affray is defined in s. 87 of the Penal Code as follows:

“Any person who takes part in a fight in a public place is guilty of a misdemeanour and is liable to imprisonment for six months or to a fine not exceeding Shs. 500/-.”

It follows that the necessary ingredients of this offence which must be proved are: (1) that there was a fight, (2) that the accused took part in it, and (3) that the fight occurred in a public place. Whatever transpired between Shabani and Tabu appears to have been in a public place and therefore the third element is not in question in these proceedings. The main point is whether there was a “fight” and if so, whether the accused took part in it. I presume that one must fall back on the old adage that it takes two to make a fight. At any rate, I think the word implies a combat of two or more persons in such a manner as to cause a breach of the peace. In the circumstances of the instant case, therefore, unless there was a fight between Shabani and Tabu, there could be no offence of affray because they were the only persons involved. Had there been several persons involved, the acquittal of Tabu would not necessarily have vitiated the conviction of Shabani. But as Tabu denied that there had been a fight, but that she had merely been assaulted by Shabani, that was a good defence to the charge against her. Even if Tabu had acted in self defence, and the primary court had accepted that defence, she would not have been guilty of the offence of affray. It follows that if she were not guilty of taking part in a fight, then Shabani’s actions in assaulting her, as she claimed, would also not have amounted to the offence of affray, but to an assault. Therefore, his conviction for affray was imperilled by Tabu’s acquittal. Authority for these propositions will be found in the case of *Sharp and Johnson v. R.* (1957), 41 Cr. App. Rep. 86, and particularly at pp. 93 and 94. The offence of affray in England is different in some respects to that in this country. Nevertheless, the views expressed in the above case concerning the right of an accused to establish self-defence or non-activity in a fight are relevant as well as the views that the acquittal of one of two combatants vitiates the conviction of the other. Perhaps I should add a rider that in my opinion when a court is faced with the situation where one of the two accused charged with affray pleads not guilty and the other pleads guilty, it would be proper to enter a plea of not guilty on behalf of both accused. In this way it can be ascertained whether the necessary ingredients of the offence had been established and if they were not, at a suitable time, the charge may be withdrawn and a fresh charge adopted, in keeping with the facts of the case.

The conviction of Shabani is unsound because although he pleaded guilty to the charge and although the “facts” put forward supported the charge, nevertheless, there is some doubt whether the facts admitted were really true. There is no certainty that there was a “fight”. Therefore, the conviction was not sound. Nor is it open to me to substitute any other conviction. Therefore Shabani’s conviction is quashed, his sentence set aside and he is to be set free forthwith unless held for other lawful cause.

Order accordingly.

Republic v Sanga
[1968] 1 EA 615(HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of ruling:	16 March 1968
Case Number:	14/1968 (126/68)
Before:	Biron J
Sourced by:	LawAfrica

[1] Criminal Practice and Procedure – Unsoundness of mind – Of accused – Proper procedure to be followed at trial before ordering accused to be detained – Criminal Procedure Code, s. 164 (6) (T.).

Editor's Summary

It is a condition precedent to a Court making an order for the detention of an accused under s. 164 (6) of the Criminal Procedure Code on the ground of unsoundness of mind that the accused be medically examined and medical and any other relevant evidence adduced.

Order for detention set aside as ultra vires.

No cases referred to.in judgment

Judgment

Biron J: The accused in this case is under a charge of failing to comply with the conditions of a removal order. It would appear from the record that he first appeared in court on October 25 last year. Then the case was adjourned a few times for reasons which are by no means apparent. On December 14, when the accused was again charged, he is recorded as pleading:

“I was served with removal order. I left the city. I came back later.”

This was entered as a plea of guilty. The facts were then presented by the prosecutor, which are briefly to the effect that the area commissioner in Dar-es-Salaam issued a removal order in respect of the accused in July, 1967, ordering him to return to Mufindi district, and forbidding him to return to Dar-es-Salaam until further notice. On October 24 the accused was found wandering about the streets of Dar-es-Salaam and he was arrested. The prosecutor produced the removal order, which, he stated, bore the thumbprint of the accused. The accused is then recorded as saying:

“I do not understand. All I know is that I came to look for employment.”

The court apparently presuming that the accused was withdrawing his plea of guilty, ordered that he be tried, and adjourned the case. The accused next appeared in court on December 27, when evidence was given by a police constable to the effect that in the early hours of October 24 he found the accused wandering about the streets, and on his asking him where he was going, the accused replied that he was simply going about. The witness accordingly arrested him on suspicion of being a rogue and vagabond. Another witness, a detective-inspector, produced from the depository of the identification Bureau a removal order made in respect of the accused, and a certificate of comparison of the thumbprint on the removal order with that of the accused to the effect that they were identical. With this the prosecution closed its case. There then appears on the record the following:

“Court: Accused is talking nonsense. I suspect accused may be mentally disturbed. It is too late to prepare Reception Order.

“Order: Accused to be F.R.I.C. until tomorrow 27/12/67 (sic).

Thomas Mteweale.

27/12/67.”

The next entry in the record is dated December 28, when, after recording that Chief Inspector Kajembe

appeared for the prosecution and that the accused was present, the record continues, and concludes as follows:

“Pros.: I have heard the accused has got a peculiar standard of living. Accused does not talk to fellow friends, he likes to stay alone. Sometimes he does not like to eat food for about two to three days.

“Court: Accused is care free. Accused answers nonsense. Accused laughs without justification. Accused looks a bit wild and queer. This is the behaviour of accused in the dock.

“Order: suspect accused may be mentally disturbed or is of unsound mind. Under powers conferred on me by s. 164 (4) of the C.P.C. I order that accused be detained in safe custody (R.I.C.). The copy of the proceedings to be transmitted to sec. vice. pr.”

The proceedings were duly forwarded to the second vice-president through the registrar of this Court. They have now, however, been returned under cover of a letter from the Director of Public Prosecutions submitting that the magistrate had failed to comply with the procedure set out in s. 164 (3) of the Criminal Procedure Code, the letter stating *inter alia*:

“The said section provides that if at the close of the evidence in support of the charge it appears to the court that a case has been made against the accused person, then it should proceed to inquire into the fact of the unsoundness of mind of the accused. The court is invested with the powers to order the accused to be detained in a mental hospital for medical examination. Only on receiving a report of the medical officer in charge of a mental hospital, could the magistrate make a finding as to whether the accused is capable of making his defence or not. In my opinion in this instant case the magistrate’s finding would appear to be unsupported by any legally admissible evidence.”

The letter concludes with a suggestion that the proceedings be submitted to a judge “with a possible view of rectifying the error in the exercise of the court’s revisional jurisdiction.”

Section 164(3) of the Criminal Procedure Code as amended by the Criminal Procedure Code (Amendment) Act 1966, referred to in the letter from the Attorney-General’s Chambers reads:

“(3) If at the close of the evidence in support of the charge it appears to the court that a case has been made out against the accused person it shall then proceed to inquire into the fact of the unsoundness of mind of the accused and for this purpose may order him to be detained in a mental hospital for medical examination or, in a case where bail may be granted, may admit him to bail on sufficient security as to his personal safety and that of the public and on condition that he submits himself to medical examination or observation by a medical officer as may be directed by the court.”

and sub-s. (4), under which the magistrate purported to act, reads:

“(4) The medical officer in charge of a mental hospital in which an accused person has been ordered to be detained or a medical officer to whom he has been ordered to submit himself for mental examination or observation pursuant to sub-s. (3) shall, within forty-two days of such detention or submission, prepare and transmit to the court ordering the detention or submission, a written report on the mental condition of the accused stating whether in his opinion the accused is of unsound mind and consequently incapable of making his defence.”

It is also necessary to set out sub-s. (6):

- “(6) Where the court, having considered any written report admitted in evidence under sub-s. (5) and any other evidence that may be available to it regarding the state of mind of the accused, is of the opinion that the accused is of unsound mind and consequently incapable of making his defence it shall record a finding to that effect, postpone further proceedings in the case, order the accused to be detained in safe custody in such place and manner as it may think fit and transmit the court record or a certified copy thereof to the Minister.”

Although one can easily envisage cases where a court on sight of an accused, that he is stark raving mad, could, from a practical point of view, dispense with any further evidence, including medical evidence, and make an order under sub-s. (6), it would appear from a perusal of all the relevant provisions that, as submitted in the letter referred to, it is a condition precedent to the court making such order that the accused be medically examined, and medical and any other relevant evidence be adduced. In this instant case, as there was no medical evidence – in fact, the accused was not even examined – the order of the court was ultra vires. Accordingly, in the exercise of this Court’s jurisdiction in revision, the order is set aside, and, in order to save time in having the proceedings returned to the district court with a direction to have the accused brought before it, it is ordered that the accused be medically examined as to his mental condition, and that after such examination he be brought before the district court, which should hear the medical evidence and any other available relevant evidence, and determine the case in accordance with law.

It should hardly be necessary to add that, if the accused is found to be sane and the court proceeds to conviction, it will take into account the time spent by him in custody, bearing in mind that the maximum sentence which the substantive offence attracts is a fine not exceeding Shs. 200/- or imprisonment for a term not exceeding three months, or both such fine and imprisonment.

Order accordingly.

For the Republic:

KRK Tampi (State Attorney, Tanzania)

Attorney General, Tanzania

Taparu v Roitei
[1968] 1 EA 618 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	28 June 1968
Case Number:	250/1967 (111/68)
Before:	Trevelyan J
Sourced by:	LawAfrica

[2] Civil Practice and Procedure – Jurisdiction – Appeal – Whether High Court has inherent jurisdiction to hear appeals from a magistrates’ court of the third class – Sections 12 (1) and 39 of the Magistrates’ Courts Act No. 17 of 1967; Civil Procedure Act 1948 (Cap. 5), s. 97 (K.).

[3] Jurisdiction – Inherent jurisdiction – Whether High Court has inherent jurisdiction to hear appeals from a magistrates court of the third class – Sections 12 (1) and 39 of the Magistrates’ Courts Act No. 17 of 1967; Civil Procedure Act, s. 97 (K.).

Editor’s Summary

The respondent brought an action against the appellant for the recovery of seven cows in the magistrates’ court at Kajiado and was awarded judgment. The appellant purported to appeal to the High Court. The respondent claimed that the appeal was incompetent on the ground that, by s. 12 (1) of the Magistrates’ Courts Act 1967, an appeal from an order made by a magistrates’ court of the third class now lies to a magistrate’s court of the first class.

Held –

- (i) section 65 (1) of the Civil Procedure Code did not give the appellant an alternative right to appeal to the High Court;
- (ii) the Court’s inherent jurisdiction should not be invoked where there was a specific statutory provision to meet the case;
- (iii) the appeal was incompetent.

Appeal dismissed with costs.

Case referred to:

- (1) *Hasmani v. National Bank* (1937), 4 E.A.C.A. 55.

Judgment

Trevelyan J: Roitei ole Karrarru (whom I shall call “the respondent”) claimed seven cows from Taparu ole Maoik (whom I shall call “the appellant”) before a magistrate at Kajiado and succeeded in his claim. Being dissatisfied with the decision given, the appellant resolved to appeal and did so, or purported to do so, to this Court. A short while ago, learning that the magistrate concerned was only empowered to hold a court of the third class, the respondent takes the point that the appeal is incompetent. In support of his argument he refers to the following provisions:

- (1) Section 12 (1) of the Magistrates’ Courts Act (No. 17 of 1967) which says:
“Any person who is aggrieved by an order of a magistrate’s court of the third class made in proceedings of a civil nature may appeal against the order to a magistrate’s court of the first class.”
- (2) Section 65 (1) of the Civil Procedure Act which was enacted by s. 39 of the 1967 Act aforesaid and which lays down:
“Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court –

- (a) from a decree passed by a subordinate court of the first class on an appeal from a subordinate court of the third class, on a question of law only;
- (b) from any other decree, part of a decree or order of a subordinate court, on a question of law or fact;
- (c) . . .”

and (3) Section 1 (2) of the Civil Procedure Act which was provided by s. 37 of the 1967 Act and which says:

“This Act applies to proceedings in the High Court and subject to the Magistrates’ Courts Act, to proceedings in subordinate courts.”

(I shall refer to the Civil Procedure Act as “the Code”, to the 1967 Act as “the Act” and to the sections mentioned by their numbers or numbers and letters as the occasion may require).

The appellant says that the appeal is properly before the court both because of the court’s paramount authority and because s. 65 (i) (b) provides the main right to appeal whilst s. 12 (1) gives him an alternative right to do so. He recognises, however, that in view of s. 12 (1) and of the difference in approach in the hearing of first and second appeals, it would be better for a first class magistrate to hear the appeal and invites the court to send it to such a magistrate for hearing accordingly. The only authority which might be claimed to permit this to be done would seem to be s. 97 of the Code which provides that:

“Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

I am unable to accept that this Court has inherent jurisdiction to hear appeals. A court’s inherent jurisdiction should not be invoked where there is specific statutory provision which would meet the necessities of the case: *Hasmani v. National Bank* (1937), 4 E.A.C.A. 55. Moreover the right to appeal must be given. Someone must be given the right to appeal. Nor do I believe that, assuming jurisdiction in this Court to transfer the appeal for hearing as requested (which at least is doubtful) such an order would be necessary for the ends of justice – the question of abuse of the process of the court does not arise – because the proviso to s. 12 (1) allows a first class magistrate’s court to extend the period of appeal “for good reason”.

With respect one may, not unfairly I think, be a mite critical of some of the drafting of the Act. Thus, although s. 65 (1) (a) relates to a decree in an appeal, the subheading immediately above it remains “Appeals from original decrees” and Part V of the Act though headed “Appeals from certain District Magistrate’s Court” deals only (unless I have overlooked something) with appeals from magistrates’ courts of the third class so that it could more appropriately have been worded. It would also, in my view, have been better if the Act had strictly limited itself to the matters referred to in its preamble which reads:

“An Act to establish Magistrates’ Courts; to declare the jurisdiction and provide for the procedure of such courts; to provide for appeals in certain cases; and for purposes connected therewith or incidental thereto.”

rather than to have dealt so extensively with the amendment of other legislation. As it is one result which follows is that the provision in the preamble relating to “appeals in certain cases” read with Part V of the Act shows that the only appeals provided for in the Act are those from courts held by magistrates possessing third class powers while to ascertain what other appeals may lie

one must look at an enactment, i.e., the Code which proclaims itself to be concerned with procedure.

After anxious thought I have come to the conclusion that the appeal must be held to be incompetent. The Act makes its provision for appeals from such a magistrate as we are here concerned with and s. 65 (1) must be read “subject to the Magistrates’ Courts Act” as provided in s. 1 (2). In other words, s. 65 (1) (b) must be read with ss. 1 (2), 12 (1) and 65 (1) (a) so that the words “any other decree” therein do not indicate an additional right of appeal. There is, perhaps, some small measure of support for my view in the fact that the period of appeal in s. 12 (2) of the Act is twenty-eight days of the date of the order appealed against whilst s. 65 (3) of the Code lays down a period of thirty days. If there were alternative rights of appeal there would not, I think, be different periods provided. There would be no reason to have them.

Appeal dismissed with costs.

For the appellant:

MK Bhandari

Bhandari and Bhandari, Nairobi

For the respondent:

GS Pall

GS Pall Nairobi

Mangat v Sharma
[1968] 1 EA 620 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	20 March 1968
Case Number:	83/1967 (112/68)
Before:	Georges CJ
Sourced by:	LawAfrica

[1] Defamation – Privilege – Libel – Defamatory letters written by client about advocate to Commissioner of Lands and to bank – Occasion privileged – Privilege qualified – Privileged occasion abused – Privilege lost by malice.

Editor’s Summary

The plaintiff, an advocate, was acting for the defendant as vendor in a land transaction at Dodoma. The terms of the agreement for sale (arranged by a third party) were that the purchaser pay Shs. 20,000/- into a suspense account not carrying interest, and as from June 1. 1966 (subsequently altered to July 1, 1966,

at the suggestion of the plaintiff), the purchaser would receive the rental from the property purchased. As soon as the transfer of the premises had been registered the Shs. 20,000/- would be transferred into the defendant's own account. The transaction for one reason and another had not been registered by January, 1967, despite repeated reminders by the defendant to the plaintiff to expedite matters. The plaintiff was found by the Court to have been dilatory and careless over replying. In February, 1967, the defendant wrote direct to the purchaser requiring him to refund the rental paid from July to December, 1967, otherwise the transaction was to be cancelled. The purchaser refused to agree and as a consequence the rent paid to the purchaser was refunded to the defendant, less interest at nine per cent. on the Shs. 20,000/-. The Shs. 20,000/- was returned to the purchaser and the premises remained unsold. The plaintiff instituted these proceedings against the defendant for libel contained in two letters dated February 21, 1967, and March 4, 1967, addressed to the Commissioner of Lands and to the National Bank of Commerce, Dodoma. The latter bank had originally held the title deeds to secure an overdraft for the defendant. The first letter was addressed also to the purchaser. In the first letter the defendant

alleged that the plaintiff had been guilty of a grave breach of trust, the underlying suggestion being that the plaintiff was in collusion with the purchaser to the defendant's detriment. In the second letter the main allegation was that the plaintiff had persuaded the defendant to sell the property at an absurdly low price and on very unfavourable terms. It was conceded that both letters were defamatory, but the Court held on the facts that it was not true that the plaintiff was guilty of a breach of trust or of persuading the defendant to sell on unfavourable terms. So the plea of justification failed. The Court held further that the letters were issued on a privileged occasion both to the Commissioner of Lands and to the Bank. The remaining question was whether the defendant acted with malice, thus depriving him of the benefit of qualified privilege.

Held – the defendant had abused the privileged occasion, i.e., had not used the occasion honestly and so had lost the protection of qualified privilege.

Judgment for the plaintiff in the sum of Shs. 1,000/- and costs.

Cases referred to in judgment:

- (1) *Adams v. Ward*, [1917] A.C. 309.
- (2) *Laughton v. Bishop of Sodor and Man* (1872), L.R. 4 P.C. 495.
- (3) *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, [1892] 1 Q.B. 431.
- (4) *Tanganyika Transport Co., Ltd. v. Nooray*, [1961] E.A. 55 (C.A.).

Judgment

Georges CJ: The facts of this case are not seriously in dispute. The plaintiff is an advocate and has been practising in Dodoma since 1959. The defendant at one time lived in Dodoma. He knew the plaintiff's father for many years and got to know the plaintiff when he established his practice in the town.

In 1963 the defendant left Dodoma for good. He owned houses there and he appointed an agent, Mr. Assan, to collect rent and generally look after the houses. Late in 1965 Mr. Assan died. The defendant wrote to the plaintiff's father asking him to take over the agency. The plaintiff replied offering his services if the defendant was agreeable, and the defendant agreed.

One of the properties owned by the defendant was a building on plot no. 6625, Dodoma. The previous agent, Mr. Assan, had agreed to purchase it for Shs. 20,000/-, one of the terms of the agreement being that he should pay the purchase price into the defendant's account on the signing of the transfer, but that he should not be entitled to rent until the transfer had been registered. The transfer was signed and the money paid, but before the deed could be executed Mr. Assan died. His widow did not want to go through with the transaction and the defendant arranged to refund the money.

Through another broker, Mr. Sulemani, Mr. Hassanali Visram became interested in buying the property. Plaintiff prepared a deed of transfer in April or May, 1966, which was executed by Mr. Visram and sent to the defendant for signature. The sale price was Shs. 20,000/-, but the terms were that the purchaser should begin collecting rent from the date he deposited the purchase price in a non-interest-earning suspense account in the bank, and that the money would be transferred to the defendant's account as soon as the transfer was registered.

If the Commissioner for Lands refused to consent to the transfer and it could not be registered, the purchaser would refund the rent collected, less interest on his deposit at nine per cent.

The defendant says that at first he was unwilling to accept these terms. Eventually, on the persuasion of his agent, Mr. Sulemani, he agreed, on condition that the date of Mr. Visram's entitlement to rent was changed from June 1, 1966, to July 1, 1966. By mid-July, defendant had executed the transfer and had despatched it to the plaintiff.

At the time, the defendant had plans for leaving Tanganyika for good. He had an overdraft at Barclays Bank, Dodoma – now the National Bank of Commerce, Dodoma – and he needed the money to clear the overdraft and make up the price of his tickets. The title deeds of the property were with the bank. They released the title deeds to plaintiff in mid-August after the Shs. 20,000/- had been deposited with them. On August 20, 1966, the plaintiff despatched the transfer, the deed and his cheque to cover stamp duty, registration and transfer fees to the Registrar of Titles.

The defendant was particularly anxious to have the transaction hurried. He had to meet a commitment – a monthly sum to reduce his overdraft – and his ability to do so would be reduced so long as he was not collecting the rent for the block of flats. Interest on his own overdraft continued to run, but he derived no benefit from the deposit which was in an interest-free suspense account.

The purchaser's position was not as difficult, but there was no advantage in it which would make it in his interest to seek to delay registration. He had Shs. 20,000/- tied up on which he would get only interest at bank rate if the transaction fell through. Though he was collecting rents, there was always to be borne in mind the likelihood of his having to refund if the deal was not completed. He has stated, and I accept, that the buildings were in poor condition, needing repairs and paint, and he could do nothing about essential maintenance until the position was definite.

On July 31, 1966, the defendant wrote to the plaintiff enquiring whether the deed had yet been sent on to the Land Office and asking that the matter be pursued vigorously as each day's delay increased the risk of his "liability for interest to Visram". The plaintiff did not reply to that query, though he did write a letter to defendant dated August 10, 1966, sending a cheque for rent collected.

On August 19, 1966, the defendant again wrote mentioning other matters and asking that plaintiff should "please press Land Office to give consent to the transfer". There was no reply to this.

On September 14, the defendant sent another letter outlining his plans to emigrate, setting out how much money he would need and asking the plaintiff to "press the Land Office really hard. Only that way their slow machinery will move a little". There was no reply.

Meanwhile, in mid-September the Registrar of Titles wrote the plaintiff informing him that the deed could not be registered until a penalty of Shs. 20/- to cover late payment of stamp duty was paid. The Registrar also asked for filing of a consent to transfer by the bank, which had a notice of deposit of title deed registered.

The plaintiff obtained the letter of consent and despatched it with his cheque for Shs. 20/-. He asked the Registrar to pass the papers directly to the Land Office after they had been dealt with. This letter is dated October 6, 1966.

There is no letter from the plaintiff to the defendant explaining these developments, but the plaintiff's evidence is that he kept the defendant informed through various messengers whom the defendant had sent to him to enquire generally as to the progress of the transaction.

Early in December, 1966, the plaintiff received a letter from the Registrar of Titles dated November 28, 1966, containing the certificate of title, the deed of transfer and revenue receipts for stamp duty, penalty and transfer fees. The Registrar informed him that the document could not be registered because “consent to disposition of land not obtained”. It is the policy of the Land Office to return documents to the persons who have sent them and not to pass them on to the Land Office, even though asked to do so. The plaintiff was not aware of this.

On October 2, 1966, there was a telegram from the defendant to the plaintiff asking for money and enquiring about the transfer. On December 11, 1966, there was yet another letter accusing the plaintiff of being “silent and indifferent”, despite “a telegram, numerous letters and verbal messages”. He again enquired about the deed, pointing out that he had asked for particulars of the matter so that he could make enquiries at the Land Office, but had not had a reply. The letter ends:

“You know quite well that each month’s delay is costing me over £6, but you couldn’t care less. Is this the way you have been taught to handle your client’s affairs? If you are too busy or have become Bwana Mkubwa now, then it behoves you to tell me so instead of treating my affairs etc. with contempt. Then I could have made some other arrangement and left you alone.”

I cannot say that the defendant’s reaction was anything but natural. The plaintiff had an obligation to keep the defendant informed about the progress of his affairs, and the proper way to do this was to let him know by letter. Oral messages are notoriously liable to distortion, and even though the plaintiff may have thought that he was entitled to transmit information by messengers sent by the defendant, the fact is that the defendant was writing letters as well, and it would have taken little time and very little expense to despatch a letter informing the defendant of the fact that his transfer had been shuttling back and forth between the Registrar of Titles and the plaintiff.

By letter dated December 7, 1966, the plaintiff applied to the Commissioner for Lands for consent to the disposition of the property, and by letter dated December 17, 1966, the Commissioner replied stating that he had written to the Regional Commissioner, Dodoma, for his views and asking that the defendant see the Regional Commissioner to supply him with any further information that may be necessary.

On December 13, the plaintiff replied to the defendant’s letter of the 11th. He was clearly annoyed, though it appears to me on the facts that the defendant’s strictures, at least as far as the registration of the transfer deed was concerned, were justified. The plaintiff, however, chose to adopt an attitude of high-handedness, and his reply was that he did not regard himself as being under any obligation to answer any query regarding the transfer deed until he heard from defendant whether he wished to avail himself of his services. The correspondence up to then contained no indication that the defendant had withdrawn his instructions. The plaintiff by then had just despatched the transfer to the Land Office. There is no mention of this, as one would have expected.

The defendant replied on December 18, 1966, mentioning other matters, and pointing out that he had thought that the deed would have been completed in two to three months, while nearly six had elapsed. He complained that plaintiff would not even let him have particulars so that he could push the matter personally.

On December 22, 1966, the plaintiff wrote enclosing the original of the letter dated December 17, 1966, which he had received from the Land Office, and asking

the defendant to take necessary action. The defendant replied on December 26, 1966, stating that it was not possible for him to arrange an interview with the Regional Commissioner at Dodoma and asking the plaintiff to supply any further information the Regional Commissioner might need. Again, he commented on the extraordinary delay in obtaining Land Office consent. There is another letter of the same date pointing out that if the deed had only been sent to the Land Office in December and not July as he had been led to believe, then the purchaser's entitlement to rent should begin from the then current month. He also complained about a debit in his account for Shs. 280/- fees in connection with the transaction. There was, as usual, no reply to this letter.

On January 30, 1967, the defendant wrote to Mr. Visram stating that he had understood that plaintiff had despatched the deed to the Land Office for consent in July, but that in fact it had not reached there until December 17, 1966. In the circumstances, unless Visram agreed to changing the date of his rent entitlement to January 1, 1967, he would cancel the deal.

On February 2, 1967, he wrote the plaintiff telling him of the letter he had written Mr. Visram in terms outlined above.

On February 12, 1967, defendant again wrote Mr. Visram stating that because of gross carelessness "on Mr. Mangat's part", the transfer deed had not been sent to the Land Office until mid-December, instead of July as it had originally been understood that it would have been. He again asked that the date of rent entitlement be moved to January 1, 1967, failing which he would treat the deal as cancelled. There was no reply to this letter.

On February 21, 1967, there came the first of the two letters which are the basis of this suit for libel. It was to the Commissioner for Lands and copied to Mr. Visram and the National Bank of Commerce, Dodoma. In it, the defendant asked the Commissioner to withhold his approval of the transfer of the property and he informed him that he had reason to believe that there had been "a grave breach of trust" on his [plaintiff's] part, as a result of which "I no longer wish to sell the property on terms originally agreed to".

A copy of this letter was also sent to the plaintiff, and this produced an unusually quick reply dated February 28, 1967, stating that he was no longer prepared to act for the defendant and noting that perhaps the defendant did not appreciate the seriousness of the allegations he had made in the letter of the 21st. Plaintiff also wrote the Commissioner for Lands a letter dated February 28, 1967, asking him not to withhold his consent because of "unilateral instructions" either from the vendor or the purchaser.

To this the defendant replied by a letter dated March 4, 1967, to the Commissioner for Lands, marked as copied to the National Bank of Commerce, Dodoma, though there was no copy of that letter on their file.

This is the second letter complained of in the suit.

He accused Mr. Mangat of grave dereliction of duty and stated in support:

- (1) that plaintiff had persuaded him to sell his property at an absurdly low price and on very unfavourable terms, referring to the fact that he would get his purchase price only when the transfer had been registered, while the purchaser began to collect rent from July;
- (2) that the plaintiff, knowing the urgency of the situation, had kept assuring him that the transfer had been despatched for the Commissioner's consent straightaway, whereas in fact it had not been despatched till December;

- (3) that when he became aware of the situation, he had written plaintiff stating that he would now agree to go through with the deal only if

the purchaser's date of rent entitlement were moved to January 1, 1967, and if the Shs. 20,000/- on deposit were paid into his account immediately, but the plaintiff had taken no notice of his letters to that effect.

He ended up by pointing out that as soon as he had written the Commissioner asking that consent be withheld, plaintiff had suddenly "come to life" and had had the audacity to try to override his wishes.

In fact, this letter reached the Commissioner on March 18. On March 11, the Commissioner had already given his consent, and he refused to alter his decision.

But the deal did not go through. Mr. Visram would not agree to the terms proposed by the defendant. The plaintiff saw to it that the documents were not registered by having them returned to him. Mr. Visram returned the rent to the defendant, less interest at nine per cent. on his Shs. 20,000/-. The property still remains unsold, the defendant is still in this country working as an accountant and seems now to have no immediate plans for emigration. The overdraft with National Bank of Commerce, Dodoma, is not yet liquidated.

Before coming to the issues, I must say that I am satisfied that the plaintiff handled the defendant's business in a manner which can only be described as offhand and indifferent. It is clear that consent and registration could much more easily have been obtained had the documents and the cheque been sent to the Land Office in the first instance. The plaintiff was not aware that this could have been done. Four full months elapsed before he had the documents returned with the comment that they could not be registered because consent for the disposition had not been had from the Land Office. Even assuming that his ignorance of this was pardonable, there are no follow-up letters to the Registrar of Titles urging action on the matter, though plaintiff must have understood that it was in the interests of both clients that the matter be brought to a speedy conclusion. He mentions as part excuse the holding of Sessions which required his constant attention. This seems hardly good enough. The comparative speed with which consent was obtained when the documents did reach the Land Office would indicate that the whole thing could have been pushed through in two to three months. It took eight. I have already said that there was an obligation on him to write in reply to the defendant's letters telling him accurately what progress there had been in the matter. The defendant's irritation was in all the circumstances understandable. Whether his actions went beyond the bounds of the permissible in law must now be considered.

The advocate for the defendant conceded, in my view quite properly, that the letters were defamatory, thus disposing of issue 5 of the six issues framed at the start of the hearing. I am also satisfied that the defendant published the letters and that they were published in the way of the plaintiff in his profession as an advocate. The plaintiff was, it is true, acting as a property agent for the defendant as well as collecting and forwarding rents. The dissatisfaction which led to the defamatory statements was centred around the registration of the transfer and it is in that context the letters were written. This disposes of the second issue.

The third issue raises justification. The defendant has contended that the words are true. The onus is on him to establish this. He has failed. Had he said that the plaintiff had acted indifferently as an advocate or that he had failed to show adequate skill in putting through a simple transfer, he may well have succeeded. He has, however, accused the plaintiff of breach of trust, of inducing him to sell his property at a low price and on unfavourable terms – he has clearly implied some collusion with the purchaser. This is clearly false. The price of Shs. 20,000/- was the price at which the defendant had agreed to sell to Mr. Assan, and the plaintiff had no connection with that transaction. On his evidence, the conditions of the sale to Mr. Visram were less favourable than those of his

sale to Assan, but the plaintiff had not arranged the conditions. Mr. Sulemani had. I cannot assume that Mr. Sulemani had done so on advice from the plaintiff. Indeed, the plaintiff's sole intervention in the arrangement of terms was to secure for the defendant one month's rent more by having the date of Mr. Visram's rent entitlement shifted from June 1, 1966, to July 1, 1966. On the defendant's evidence, it would not have been accurate to say that the plaintiff had been assuring him that the transfer had been despatched to the Land Office since July, when in fact it had not been sent until December. The essence of the defendant's complaint (genuine, in my view) was that the plaintiff would tell him nothing at all. The defendant assumed that it would have been sent by July because by then it was ready to be sent. The final allegation that the plaintiff had remained silent when he had written asking for a change of the conditions of sale in view of the delay in obtaining registration of the transfer is true, but I do not see how this could be categorized as "a grave breach of trust". The plaintiff was acting for both parties in the matter, as far as the legal work was concerned. A broker had arranged the sale. Failure to intervene when the defendant sought a re-arrangement cannot be said to be a breach of trust.

In this context advocate for the defendant has stressed the fact that the plaintiff had debited the defendant's rent collection account with Shs. 280/-, being legal fees in connection with the registration of the transfer.

The defendant mentions this in the letter of March 4. It should be noted, however, that he does so in a context which is not strictly accurate. He says that the plaintiff deducted "£14 from his fee in respect of this transfer deed, whereas the understanding was that it should have been recovered from the purchaser". The fairly voluminous correspondence from the defendant does not show that at any time he ever made it clear that the purchaser was to pay fees in this matter. He stated eventually that the assertion in his letter was based on "custom". It is clear that the paragraph was meant to convey that the plaintiff had appropriated the defendant's funds to his own use on the pretext of recouping his fees when there had been an understanding that the client should pay not fees. This is clearly not the case. I am satisfied, therefore, that the defendant has not justified the libel, and my findings on issue 2 is that the allegations contained in the letters complained of are not true.

This leaves the issues of qualified privilege and malice.

The authorities are, I think, clear on the principle that a privileged occasion arises where the defendant has an interest in making the communication to the third person, and the third person has a corresponding interest in receiving it. Mr. Grimble stressed that this reciprocity is of the essence of the matter, and I agree with him. He argued that such a situation did not exist between the Commissioner for Lands and the defendant. I am inclined to think that it did.

A situation had arisen in which the defendant no longer wished to go through with a transaction into which he had entered. There was good reason for thinking that the delay which had bedevilled him was so contrary to his interest that it would no longer be worth his while unless the terms were substantially changed. In such a case, he would be justified in writing to the Commissioner stating that he no longer wished the Commissioner's consent to the transfer and he would be justified in stating his reasons, even if it involved publishing defamatory matters. Clearly, the defendant would have an interest in the subject matter, and I would think that the Commissioner also would have an interest. His is the decision as to whether consent should be granted or not, and a proper decision would require full knowledge of all the facts.

I think that the occasion would be privileged as far as the communication to Mr. Visram was

concerned. The defendant and Mr. Visram were the parties

to the contract, and the plaintiff was acting for both of them in securing registration. If the defendant no longer wished to go through with the matter except on altered terms, because of what he conceived to be the plaintiff's conduct, he would have an interest in communicating the reasons to Mr. Visram, and Mr. Visram would have a similar interest in receiving the communication.

There remains the publication to the bank. The property had been pledged with them by way of a notice of deposit of title deeds. It was part of the security for the defendant's overdraft. They had stated that they had no objection to the transfer of the property to Mr. Visram and had actually handed over the title deed to the plaintiff so that registration could be effected. In these circumstances, I would hold that they had a sufficient interest in the matter as to warrant their being told that it was no longer going through and the reasons for that, and they also, it would seem to me, would have an interest in receiving this information.

I would hold, therefore, that all the publications were on privileged occasions.

The defendant would not be liable under the circumstances, unless malice were proved.

It may be well at this stage to mention a point which I raised on the pleadings. In his statement of defence, the defendant in para. 3 alleged that the words were published on occasions of qualified privilege. There was no reply specifically alleging malice, and I was in some doubt whether that issue could be raised unless particulars of the malice had been set out in reply.

This is the position in the English Rules of the Supreme Court, O. 82, r. 3 – formerly O. 19, r. 22. It would appear that this requirement was first introduced by a proviso to the old O. 19, r. 22. The relevant Order in Tanzania is O. 6, r. 10, which reads like the old O. 19, r. 22, without the proviso:

Our rule reads:

“Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstances from which the same is to be inferred.”

In England there is a proviso:

“Provided that where in an action for libel or slander, the defendant pleads that any of the words or matters complained of . . . were published upon a privileged occasion, the plaintiff shall, if he intends to allege that the defendant was actuated by express malice, deliver a reply giving particulars of the facts and matters from which such malice is to be inferred.”

I think the proviso makes a desirable change in the law. The malice which can be inferred from the fact of publication is a very different malice from the express malice needed to remove protection from a statement made on an occasion of qualified privilege, and a defendant should be entitled to know what is being alleged and the plaintiff should not be at liberty to catch at whatever may turn up at the trial to prove his allegation of malice. This is what the position is in Tanganyika under the present rule.

The principles governing situations in which proof of malice will make unavailable a plea of qualified privilege were exhaustively and authoritatively discussed in *Adam v. Ward*, [1917] A.C. 309. There was not complete unanimity. In my view, however, the statement of Lord Atkinson expresses aptly one of the cardinal points decided in the case ([1917] A.C. at p. 339):

“There authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege, but that, on the

contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.”

The use of the word “vindication” indicates that his Lordship had in mind defence against personal attack, but it would seem to me that the principle is equally applicable to protection of an interest.

On p. 340 the following statement appears, which seems relevant in the circumstances of this case:

“What would be the effect of embodying separable, foreign and irrelevant defamatory matter in a libel? Would it make the occasion of the publication of the libel no longer privileged to any extent, or would these portions of the libel which would have been within the protection of the privileged occasion if they stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all and furnishing possible evidence that the relevant portion was published with actual malice? In the absence of all guiding authority, the latter would in my opinion be more consistent with justice and legal principle, and I think it is, in law, the true result.”

The main theme of Mr. Grimble’s argument was that quite clearly the allegations made in the letters went beyond anything that could have been said to have been reasonably required for the protection of the defendant’s interest. He argued that the defendant could not have honestly believed that the plaintiff had persuaded him to sell his property at an absurdly low price. The price of Shs. 20,000/- was the price he had agreed to sell to Mr. Assan. Although the terms were less favourable than those he had agreed with Mr. Assan, he could not honestly believe that the plaintiff had persuaded him to accept those terms. He had a broker, Mr. Sulemani, and had acted on his advice. According to the defendant he had assumed that Sulemani had himself had this advice from the plaintiff. There is no evidence that he had good reason to believe so.

The paragraph numbered 1 in the letter of March 4 carries the clear implication of collusion between the plaintiff and the purchaser. That this implication was intended can be seen from a letter written by the defendant to the bank on January 27, 1967, in which he specifically alleged that the plaintiff had acted in collusion with Mr. Visram and to the detriment of his interests. A moment’s thought would show that Mr. Visram had nothing to gain from the delay in registering the transfer.

The allegation that the plaintiff had deducted fees from the account despite an understanding that it should have been recovered from the purchaser again emphasizes the implication that the plaintiff was in collusion with the purchaser to the detriment of the defendant.

I bear in mind the doctrine of the Privy Council in the case of *Laughton v. Bishop of Sodor and Man* ((1872), L.R. 4 P.C. at p. 508):

“To submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, that protection which the law throws over privileged occasions.”

The plaintiff had treated the defendant with scant courtesy in this transaction and had handled a transaction which he knew should have been treated urgently with a lamentable lack of despatch, The defendant was angered and in his anger made statements recklessly, not caring whether they were true or not. He could

quite easily have pointed out to the Commissioner and the bank that the plaintiff's inordinate delay in dealing with the matter had made the transaction unprofitable and that he did not wish to go through with it unless the terms were changed.

The language of Lord Esher in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*, seems appropriate to the facts of this case ([1892] 1 Q.B. at p. 443):

"I think the question is whether he is using the occasion honestly or abusing it. If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion. The jury here appear to have thought that the defendant said what was false knowing it to be false. I cannot agree with that view of the case. If the case depended on a finding to that effect, I should be loth to find it. But there is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held by a jury to have abused the occasion. Therefore, the question seems to me to be whether there is evidence of such a state of mind on the part of the defendant. It has been said that anger would be such a state of mind."

If anger is such a state of mind, and as a result of that anger

"he was reckless, whether what he stated was true or false, there would be evidence upon which a jury might say he abused the occasion."

In this case, I find that the plaintiff has abused the occasion and so loses the protection of qualified privilege. He is therefore liable to the plaintiff in damages.

I am urged to make the damages substantial, and my attention was drawn to the case of *Tanganyika Transport Co., Ltd. v. Nooray*, [1961] E.A. 55, where a sum of Shs. 20,000/- was awarded. I am aware that the libel in this case was spoken of the plaintiff by way of his profession and this could be said to have made it a serious matter. The area of publication was, however, very narrow, and its effect negligible. The plaintiff had been acting for the bank in Dodoma and there is no evidence that they for a moment reconsidered his informal retainer in the light of the information they had received.

The plaintiff had himself provoked the state of anger which led to the outburst. I do not think this is a case for substantial damages. I assess damages in the sum of Shs. 1,000/-.

The defendant will pay the plaintiff his taxed costs.

Judgment for the plaintiff.

For the plaintiff:

RS Grimble

Fraser Murray, Roden & Co, Dar-es-Salaam

For the defendant:

Ranbir Singh

Awtar Singh & Co, Dar-es-Salaam

**Masaka District Growers Co-operative Union v
Mumpiwakoma Co-operative Society, Ltd and others
[1968] 1 EA 630 (CAK)**

Division: Court of Appeal at Kampala
Date of judgment: 15 July 1968
Case Number: 20/1968 (115/68)
Before: Sir Clement de Lestang V-P, Spry and Law JJA
Sourced by: LawAfrica

[1] Arbitration – Prohibition – Application to prohibit arbitrator – Reference of matter to arbitrator by Registrar of Co-operative Societies did not comply with the requirements of Co-operative Societies Rules, s. 42 (2) and Co-operative Societies Act (Cap. 93), s. 68 (U.) – Application to prohibit arbitrator from considering matters other than those specifically sent to him – Whether order of prohibition issued as of right.

[2] Co-operative Society – Arbitration proceedings – Reference to arbitrator by Registrar of Co – operatives did not comply with r. 42 (2) (c) of the Co-operative Societies Rules – Whether order of prohibition issued as of right – Whether reference void – Co-operative Societies Act, s. 68 (Cap. 93) (U.).

[3] Prohibition – Arbitrator – Reference to arbitration by Registrar of Co-operative Societies under Co-operative Societies Act, s. 68 – Reference not complying with Co-operative Societies Rules, r. 42 (2) – Whether order of prohibition issued as of right – Law Reform (Miscellaneous Provisions) (Rules of Court) Rules; Judicature Act 1967, s. 34 (1) (U.).

Editor's Summary

The applicant was a co-operative union engaged in processing coffee for its member societies, one of which was expelled by the union and seven others of which were suspended. The expelled and suspended member societies appealed to the Registrar of Co-operative Societies, and on January 16, 1965, the Registrar, in pursuance of the powers conferred on him by s. 68 of the Co-operative Societies Act, appointed an arbitrator in the dispute between the union and the respondent societies. The union complained that there had been no proper reference of the dispute under the Co-operative Societies Rules, in that the letter of reference did not set out full particulars of the dispute or fix a time within which the award should be forwarded by the arbitrator. The first hearing before the arbitrator was on April 9, 1965, and the second hearing on January 25 and 26, 1966, at which counsel for the appellant again protested that there was no order of reference nor sufficient particulars. The appellant thereafter applied for an order of prohibition, which application was dismissed by the court below (see [1968] E.A. 258); and against this dismissal the appellant now appealed:

Held – (per de Lestang, V.-P., and Spry, J.A.; Law, J.A. dissenting):

- (i) the reference to the arbitrator did not comply with r. 42 (2) of the Co-operative Societies Rules, and the appointment was therefore a nullity;
- (ii) as there was a patent lack of jurisdiction, the appellant was entitled to an order of prohibition as of right.

Order of High Court set aside and an order prohibiting the arbitrator from proceeding substituted.

Observation per de Lestang, V.-P.: The member societies' complaints were matter more proper for

investigation rather than arbitration.

Appeal allowed with costs.

Cases referred to in judgment:

- (1) *Farquharson v. Morgan*, [1894] 1 Q.B. 552.
- (2) *Buggin v. Bennett* (1767), 4 Burr. 2035; 98 E.R. 60.
- (3) *Christopher Brown, Ltd. v. Genossenschaft Oesterreichischer*, [1954] 1 Q.B. 8.
- (4) *Turner v. Kingsbury Collieries, Ltd.*, [1921] 3 K.B. 169.

July 15, 1968. The following considered judgments were read:

Judgment

Spry JA: This is an appeal from an order of the High Court of Uganda dismissing an application for an order of prohibition.

The appellant is a co-operative society which processes coffee on behalf of its members. Its members are also co-operative societies, formed of growers. It would appear that, in 1964, some of the member societies expressed dissatisfaction with the management of the appellant society, whereupon the appellant society expelled one of the member societies and suspended seven others. This is said to have been done in exercise of powers contained in the by-laws of the appellant society.

The societies which had been so expelled or suspended appear to have referred the matter, through their advocates, by letter dated January 12, 1965, to the Registrar of Co-operative Societies. It is perhaps unfortunate that this letter is not on the record, so that we do not know what action the Registrar was asked to take. The action that he did take was to write a letter, on January 16, to a Mr. V. T. Mitala, a Senior Co-operative Officer, as follows:

“Appointment of an arbitrator.

Dispute between Masaka G.C. Union Ltd. and expelled societies.

In pursuance of the powers conferred upon me by s. 68 of the Co-operative Societies' Act. I hereby appoint you ARBITRATOR of the dispute between Masaka Growers Co-operative Union, Ltd. and the societies which have been expelled and others which have complaints with the Union.

2. Some of the societies concerned are: Kitibwa Kya Buganda, Anasera Ababe, Kabwangu, Kyamusoke, Manyi, Kyayagaliza Embazzi and Mumpiwakoma.
3. As there is some urgency in this matter, will you please start the work of arbitration with the minimum of delay. Please do inform me of your findings in the course.”

On February 12, Mr. Mitala wrote to the appellant society, stating that he had been appointed to settle the dispute between “the expelled societies” and the appellant society and fixing February 22 as the date when he would hear the dispute.

On February 15, Messrs. Kiwanuka & Co., Advocates, wrote to Mr. Mitala, drawing his attention to the provisions of r. 42 (2) of the Co-operative Societies Rules and asked, if there had been compliance with those provisions, that they should receive a copy of the order of reference.

Also on February 15, the Registrar wrote to Mr. Mitala quoting “the summary of the dispute” as contained in the letter of January 12. This is as follows:

“Dispute between Masaka D.G.C.U. Ltd. and the expelled and suspended

societies.

Further to my letter No. 389/X.II dated January 16, 1965, I quote here below the summary of the dispute put forward by the expelled and suspended

societies through their lawyers, Messrs. Mayanja, Clerk and Company in their letter of January 12, 1965.

- '1. Our clients allege that the affairs of the Union are being or have been mis-managed, and particularly that the amount of coffee sold to the Coffee Marketing Board in the 1962/63 season was greater than the amount shown in the Union's balance sheet for that year. Our clients further challenge the balance sheet for that reason on several other important items on which they are ready and willing to give evidence.
2. Our clients complain that when, in accordance with the Union's bylaws, they drew attention to the matters stated in 1 above, the Union retorted by expelling Mumpiwakoma and suspending seven other primary societies. The expulsion and suspension it is contended, were harsh and illegal in that they were contrary to rules of natural justice'."

The letter also contained the names of the societies that had been expelled or suspended, including the four respondent societies. Mr. Mitala sent a copy of this letter to Messrs. Kiwanuka & Company, the advocates for the appellant society, on March 10.

Meanwhile on March 9, Messrs. Binaisa, Mboijana & Co., who had then been instructed to act for what, for convenience, I shall refer to as the expelled societies, wrote to the Commissioner for Co-operative Development, who is also the Registrar of Co-operative Societies, pointing out that, in appointing an arbitrator, he had failed to define the disputes to be determined and offering to assist in framing terms of reference. They also objected to the choice of arbitrator, saying that the members of the Co-operative Department were too closely involved in all these matters and asking for the appointment of an independent arbitrator.

On March 11, Messrs. Kiwanuka & Company wrote to Mr. Mitala, saying that it would seem that there had been no order of reference as envisaged by r. 42 (1) of the Co-operative Societies Rules, adding that full particulars of the dispute had to be given.

On March 17, Mr. Mitala wrote to Messrs. Binaisa, Mboijana & Co., and in the course of his letter remarked that:

"You will note that the Registrar of the Co-operative Societies only furnished me with the summary of the dispute, but not the full details. But now Messrs. Kiwanuka & Co. want to know (and I feel they are rightly entitled to) the details and particulars of the summary of the dispute as contained in the Registrar's letter. . . ."

Messrs Binaisa, Mboijana & Co., replied on April 6, setting out five specific matters on which information was sought regarding the receipts and expenditure of the appellant society.

Many other letters were exchanged, but I think those I have cited are sufficient for the purposes of this appeal. In spite of the objections that had been taken, Mr. Mitala sat on various dates, at wide intervals, and heard evidence and argument. As the arbitration developed, Messrs. Binaisa, Mboijana & Co., appear to have made various requests for particulars. Most of them relate to accounting matters, but in addition, among other matters, there was a request for the production of all minutes of general meetings of the appellant society since its incorporation and for:

"Particulars of the houses or premises purchases by the Union and tenants now in occupation and the rents realisable therefrom."

This immediately led to a complaint by Messrs. Kiwanuka & Co. that the

original issues were being ignored and new issues introduced. However, after more correspondence the Registrar, on July 10, wrote to the manager of the appellant union in purported exercise of the powers conferred on him by s. 24 of the Co-operative Societies Act requiring him to produce various documents and particulars to Messrs. Binaisa, Mboijana & Co. This order was not complied with and after more correspondence, Messrs. Binaisa, Mboijana & Co., on November 19, issued a notice to Messrs. Kiwanuka & Co., requiring them to produce the documents and particulars to Mr. Mitala. It is not clear from the record what happened during the ensuing months but it appears that on September 14, 1966, Mr. Mitala made an order directing the appellant society to produce books and papers relating to a house in Masaka alleged to have been purchased by the society. Messrs. Kiwanuka & Co. then applied, under the Law Reform (Miscellaneous Provisions) (Rules of Court) Rules, for leave to apply for an order of prohibition and this was granted on September 17, 1966. The relief sought was an order stopping Mr. Mitala from performing the duties of arbitrator or, in the alternative, for an order prohibiting him from introducing new matters over and above those mentioned in the letter of January 15, 1965, from the Registrar to Mr. Mitala.

The application was heard and dismissed by Mr. Justice Sheridan, who held, first, that the letter of January 15, 1965, read with the subsequent correspondence “sufficiently defined the dispute”; secondly, that even if the arbitrator permitted the introduction of matter not strictly within the order of reference, that was a matter that could be cured on appeal; and, thirdly, that while the order of reference did not limit the time within which an award should be made, as it should have done, the proper remedy was by way of appeal, not prohibition.

At the hearing of the appeal, Mr. Kiwanuka, who appeared for the appellant society, submitted that as there never was an order of reference which complied with r. 42, Mr. Mitala never had jurisdiction to act as an arbitrator and therefore that an order of prohibition should have issued as of right. Mr. Kiwanuka pointed out that objection had been taken from the start and he argued that the participation of the parties in the subsequent proceedings could not give jurisdiction where none existed.

Mr. Mboijana, for the respondent societies, argued that the requirements of r. 42 serve two purposes: in the first place, they enable the appointment of arbitrators, and, in the second, they clarify the issues in the absence of pleadings. He submitted that the letter of January 16, 1965, effected the appointment of Mr. Mitala as arbitrator and that that letter, read with the letter of February 15, 1965, constituted the order of reference. The other correspondence was intended to narrow the field of dispute, was procedural and could therefore be agreed. Mr. Mboijana conceded that r. 42 (2) (c) had not been complied with, but argued that this was an irregularity not going to jurisdiction.

I am reluctant to criticise the Registrar, who is not a party to the appeal and has not had the opportunity to defend his actions, but I cannot but think that much of the difficulty that has arisen is due to his failure at the start to consider sufficiently whether this was a case for arbitration and if so, whether he had the material to make an order of reference. This is particularly unfortunate in that the attention of the Registrar and that of Mr. Mitala were expressly drawn, by both sides, to the requirements of an order of reference. It is true that s. 68 of the Act is expressed in wide terms but it relates only to disputes, and in this context a dispute can, I think, only exist where one party is averring something, which is denied by the other. I think there may have been a dispute, in this sense, in the present case, as to whether the respondent societies had properly been expelled or suspended from the appellant society, although even here the issue was never clearly defined. A balance sheet was also challenged but this would seem to have been complaints calling for an investigation rather

than dispute capable of being determined by arbitration. Indeed, I cannot help thinking that the Registrar did not clearly distinguish between his powers under s. 47 and those under s. 68.

However that may be, the main question that we have to consider is whether or not there was a valid appointment of an arbitrator. If there was, an application for prohibition would be in the discretion of the court and having regard to the long acquiescence by the appellant society in the arbitration proceedings, I would think that the learned judge was right to refuse the application in the exercise of that discretion. If, however, the appointment was bad and there could be said to be a patent lack of jurisdiction, the appellant society is entitled to an order as of right (*Farquharson v. Morgan*, [1894] 1 Q.B. 552) and no amount of acquiescence will affect that right (*Buggin v. Bennett* (1767), 4 Burr. 2035; 98 E.R. 60). Incidentally, there is no presumption of jurisdiction (*Christopher Brown, Ltd. v. Genossenschaft Oesterreichischer*, [1954] 1 Q.B. 8).

In my view, where there is a statutory power to appoint an arbitrator, there must be reasonably strict compliance with the statutory requirements and in default the arbitrator has no jurisdiction.

Taken by itself, the letter of January 16, 1965, could not possibly be regarded as an order of reference and even read with the letter of February 15, 1965, it still, in my opinion, falls far short of what is required. Rule 42 (2) (b) requires an order of reference to “set out the dispute and full particulars thereof”. All that was furnished to Mr. Mitala was a statement of vague allegations, such as “mismanagement”. Even if one were to take the view that the dispute was as to the propriety or otherwise of the expulsion and suspension of the societies, it could not be said that “full particulars” were given. The letter does not even give the grounds on which the appellant society purported to expel and suspend member societies. Furthermore, there was no compliance with the requirement of r. 42 (2) (c), which requires an order of reference to limit the time within which the award is to be made. I am inclined to agree with Mr. Mboijana that failure to comply with para. (c) would not, of itself, be fatal because it is a matter which could so easily be put right but the failure to comply with para. (b) goes, in my opinion, to the root of the matter. I cannot agree with Mr. Mboijana that the appointment of the arbitrator and the particulars of the dispute are severable. It is the order of reference that constitutes the appointment and an order of reference which does not specify the dispute is, in my opinion, a nullity.

It is unfortunate that so much time and money has been wasted but that cannot influence the decision. If, as I think, there never was an order of reference, the appeal must succeed. The fact that the appellant society appeared, under protest, before Mr. Mitala cannot have given him jurisdiction under the Act nor can a submission under the Arbitration Act be implied, since Mr. Mitala clearly purported to act under the Co-operative Societies Act. That being so, I think Mr. Kiwanuka was entitled to ask for an order of prohibition as of right. It is, therefore, unnecessary to consider the alternative submission.

I would allow the appeal, set aside the order of the High Court and substitute an order prohibiting Mr. Mitala from proceeding in the matter of the purported arbitration. I would award the appellant society the costs of the appeal and its costs in the High Court. We were not asked to make any order as to the costs of the abortive proceedings before Mr. Mitala and I would make none.

Sir Clement De Lestang V-P: I have had the advantage of reading in draft the judgment of Spry, J.A., and I agree with it. I only wish to add a few words of my own.

The question for decision in this appeal is whether the reference to the arbitrator was a nullity in which case prohibition would issue ex debito justitiae

or a mere irregularity curable by acquiescence, in which case prohibition would be discretionary. An arbitration of the kind under reference is a statutory arbitration governed by s. 68 of the Co-operative Societies Act and rr. 42 and 43 of the Co-operative Societies Rules made under the Act. By s. 68 of the Act it is provided that any dispute touching the business of a registered society . . . shall be referred to the Registrar for decision and the Registrar is given a discretion either to decide the dispute himself or refer it for disposal to an arbitrator. Rule 42 (2) provides that if the Registrar decides to refer the dispute to arbitration his decision shall be embodied in an order of reference under his hand, and that:

“Every order of reference under this rule shall –

- (a) specify the name, surname, place of abode and occupation of the arbitrator;
- (b) set out the dispute and full particulars thereof; and –
- (c) limit the time within which the award shall be forwarded by the arbitrator . . .”

The Registrar’s letter of January 16, 1965, purporting to refer to an arbitrator a dispute between the respondents and their Union, complies with none of the requirements of r. 42. It does not state the place of abode of the arbitrator which is required in (a); it does not say what the dispute is about, which is required by (b); and it does not limit the time within which the award shall be made, as required by (c). The failure strictly to comply with (a) and (c) is probably not fatal but the failure to comply with (b) is a fundamental omission going to the root of the arbitrator’s jurisdiction. Accordingly, if the letter of January 16, 1965, is alone to be looked at, the reference is, in my view, clearly a nullity as it fails to state what the dispute is which the arbitrator must decide. Is the position any different if it is read with the letter of February 15, 1965? That letter purports to give a “summary of the dispute” while r. 42 requires the reference to “set out the dispute and full particulars thereof”. The summary itself is of the vaguest nature and it is this vagueness which is directly responsible for the long delays which have occurred and which eventually led to the application to the court for an order of prohibition. The only matter referred to in that letter which could possibly qualify as a dispute between the member societies and their Union, is that concerning their expulsion or suspension, as the case may be, from the Union, but even this is linked up with the allegation of mismanagement which, in the words of the learned judge below, “covers a multitude of sins”. So even if both letters are read together still, in my view, they do not constitute a proper reference because requirement (b), a fundamental requirement of r. 42, has not been complied with. It seems to me that the member societies’ complaints were matters more proper for investigation rather than for arbitration. In any case it was impossible for the arbitrator to know exactly what was in dispute between the parties and as a result he seems to have thought that he had unlimited powers to enquire into every aspect of the affairs of the Union which the member societies might challenge under the umbrella of mismanagement. This is a direct result of the failure of the Registrar to comply with the Rules.

I would accordingly hold that the reference is a nullity and that prohibition should issue. There will be an order in the terms proposed by Spry, J.A.

Law JA: The facts are fully set out in the judgment of Spry, J.A., and need not be repeated. It is unfortunate that the question whether prohibition would lie in this case was not fully canvassed either in the High Court or before us. At first sight it appeared to me that prohibition would not lie to an arbitrator (see *Turner v. Kingsbury Collieries, Ltd.*, [1921] 3 K.B. 169), but the position in

Uganda is governed by s. 34 of the Judicature Act 1967. By sub-s. (1) of that section:

“The High Court may make an order . . . of

(b) prohibition, prohibiting any proceedings or matter;”

It is difficult to imagine wider or more general words, and there would appear to be no reason why, in Uganda, prohibition should not issue to prohibit proceedings before an arbitrator in a proper case. The question then arises whether the appellants were entitled to an order of prohibition as of right or whether Sheridan, J., had a discretion in the matter. This depends on whether the proceedings were a nullity ab initio. Mr. Kiwanuka for the appellants submitted that the order of reference was so defective as to result in a total absence of jurisdiction. By r. 42 (2) of the Co-operative Societies Rules, an order of reference shall:

“(a) specify the name, surname, place of abode and occupation of the arbitrator;

(b) set out the dispute and full particulars thereof; and

(c) limit the time within which the award shall be forwarded by the arbitrator.”

As to (c), the reference only says that the matter is urgent and that the work of arbitration should be started without delay. This is not a sufficient compliance with the rule, but I agree with Spry, J.A., that this defect is not fundamental and does not go to jurisdiction. The appellants’ objection under para. (b) is much more substantial. The arbitrator is merely asked to inquire into a dispute which is not particularized at all, and the parties to the dispute are not correctly described. Had matters stood there, I have no doubt that the order of reference would have been a nullity. Some particulars of the dispute, and a correct description of the parties, were however supplied later by the Registrar at the request of all the parties. These provided a basis upon which the arbitrator was able to start work, and he in fact sat on several occasions with representatives of the appellants and respondents present and participating. In these circumstances the irregularities in the original order of reference have to some extent been cured, and I see no reason to differ from the learned judge’s decision to treat the matter as one within the scope of the exercise of his discretion. In the words of McCardie, J., in *Turner’s* case (*supra*):

“Upon the whole I come to the conclusion, though not without doubt, that upon the circumstances of the present case the grant of a writ of prohibition would be discretionary apart from the preliminary point. No error is here, I think, apparent on the face of the record within the technical meaning of those words.”

One of the factors which caused McCardie, J., to exercise his discretion against ordering prohibition was that the legislation he was considering provided for a right of appeal from the decision of the arbitrator. In the same way Sheridan, J., in the case now under consideration had in mind, in exercising his discretion, that by r. 68 (5) any party aggrieved by the award of an arbitrator may appeal therefrom to the Registrar, and by r. 69 a further right of appeal is prescribed to the court on points of law. Sheridan, J., was also influenced in deciding how to exercise his discretion by the fact that so much work had been done and time expended on the arbitration, with the participation of the parties. It has not been shown to my satisfaction that he wrongly exercised his discretion in refusing to order prohibition.

I would dismiss this appeal.

Appeal allowed. Order of High Court set aside and order of prohibition substituted.

For the appellant:

BKM Kiwanuka

Kiwanuka & Co, Kampala

For the respondent:

C Mboijana

Binaisa, Mboijana & Co, Kampala

For the arbitrator:

MB Matope

Re Maangi
[1968] 1 EA 637 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	1 October 1968
Case Number:	161/1965 (117/68)
Before:	Farrell J
Sourced by:	LawAfrica

[1] *Constitutional Law – Discriminatory legislation – Grant of letters of administration to an African widow – Indian Acts (Amendment) Act (Cap. 2 1948 Revision), s. 9; Constitution of Kenya (Amendment) Act 1964, s. 14 (1); Constitution of Kenya, s. 26 (1) (3) and (4) (K).*

[2] *Probate and Administration – African administratrix – Grant of letters of administration to African widow – Indian Acts (Amendment) Act (Cap. 2 1948, Revision), s. 9; Constitution of Kenya (Amendment) Act No. 28 of 1964, s. 14 (1) – Constitution of Kenya, s. 26 (K).*

Editor's Summary

The applicant, an African widow, applied for the grant of letters of administration over the estate of her deceased husband. Previously it had not been the practice of the High Court of Kenya to grant letters of administration to Africans because of the interpretation of s. 9 of the Indian Acts (Amendment) Act, which provides that all Indian Acts shall apply to Africans only so far as they relate to certain specified matters. The matters specified clearly do not include probate and administration. The argument put forward by the applicant was that s. 9 of the Indian Acts (Amendment) Act was a discriminatory

provision within the meaning of s. 26 (1) and (3) of the Constitution of Kenya, and was not saved by the provision in s. 26 (4) (*b*) as being a matter of personal law. Counsel submitted that, although the devolution of property was a matter of personal law, the appointment of administrators was a matter of general law.

Held –

- (i) s. 9 of the Indian Acts (Amendment) Act, in so far as it had the effect of precluding the application of the Indian Probate and Administration Act to Africans was a discriminatory provision;
- (ii) the provision in s. 9 must therefore be construed as if the Probate and Administration Act was mentioned as a specific enactment in s. 9 (2) as applying to Africans.

Application allowed.

No cases referred to in judgment

Judgment

Farrell J: This is an application for the grant of letters of administration to the widow, an African, of a deceased African inspector of police. The application involves an important question of principle, since hitherto it has not been the practice to make such grants to Africans. The existing practice stems from a provision in the Indian Acts (Amendments) Act which appears as Cap. 2 of the Revised Edition of the Laws of Kenya, 1948. Section 9 of that Act deals with the application of Indian law to Africans. Sub-section (1) reads as follows:

- “(1) The provisions of all Indian Acts already applied or hereafter to be applied in (the Colony) shall apply to Africans to the extent herein provided or as may be expressly declared by (Ordinance) but not otherwise.

Sub-section (2) lists certain enactments as extended to Africans. It is sufficient to mention that the Indian Probate and Administration Act 1881, is not so listed. Then sub-s. (3) provides as follows:

- “(3) The provisions of all other applied Indian Acts shall extend to Africans in so far as they refer to the following matters:
- The protection of life and property.
 - The maintenance of order.
 - The collection and payment of revenue fees or charges either generally or locally.
 - Railways and tramways.”

It has never been suggested that sub-s. (3) has any relevance to the Probate and Administration Act, and the effect of the section read as a whole has been to exclude the application of the Act in question to Africans, and to prevent the grant to Africans of probate or letters of administration.

The Indian Acts (Amendment) Act has not been included in the 1962 Revision of the Laws, but it has not been repealed and remains of full force except in so far as its provisions may have been modified by the Kenya Independence Order in Council 1963, and the Constitution of Kenya established thereunder.

The present application was in the first place brought before the court by originating summons in Civil Case No. 1015 of 1964 (O.S.). Those proceedings were in fact irregular, the proper procedure being by petition, but before the irregularity was noticed, the issues which arise were fully argued by counsel for the applicant, and by Mr. Potter, Q.C., on behalf of the Attorney-General, who appeared as *amicus curiae* with Mr. Kivuitu. Before dismissing that application on grounds of irregularity I undertook that if a petition were presented in proper form, the court would be guided by the arguments put forward at the hearing of the summons in deciding whether the petition could properly be granted. This has now been done, and I have to decide whether there is any longer any legal obstacle to the grant of letters of administration to an African.

The Indian Acts (Amendment) Act is, for the purposes of the Constitution of Kenya (Amendment) Act 1964 (No. 28 of 1964), an existing law. Section 14 (1) of that Act reads as follows:

- “Subject to the provisions of this Act, the existing laws shall, notwithstanding the constitutional changes, continue in force as from December 12, 1964 as if they had been made in pursuance of the amended Constitution, but they shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the amended Constitution.”

Section 26 of the Constitution – and this section has not been amended in any material respect – provides in sub-s. (1) as follows:

- “(1) Subject to the provisions of sub-ss. (4), (5) and (8) of this section no law shall make any provision that is discriminatory of itself or in its effect.”

The meaning of “discriminatory” is defined in sub-s. (3) as follows:

- “(3) In this section, the expression ‘discriminatory’ means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

Subsection (4) so far as it may be material reads as follows:

- “(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision –

....

- (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; . . .”

There is nothing in sub-ss. (5) and (8) which need be considered in the present context.

It is agreed by both counsel who appeared before me on the originating summons that s. 9 of the Indian Acts (Amendments) Act is discriminatory within the meaning of s. 26 (3) of the Constitution, and I do not think I need say more than that I agree with their views, and accept that the section (so far as any rate as it effects the application to Africans of the Indian Probate and Administration Act) is discriminatory. It might, however, be thought that the provision made by the section fell within sub-s. (4) (b) as being one with respect to the devolution of property on death or some other matter of personal law, in which case it would be unaffected by sub-s. (1). Both counsel have considered this point and have agreed that the matter is not one of personal law: Mr. Bhandari on the ground that the Indian Probate and Administration Act is procedural and does not deal with devolution of property, and Mr. Potter on the similar ground that whereas devolution of property is a matter of personal law and determines who are to be the beneficiaries, the transmission of property is a matter of the general law, and the appointment of administrators is part of the machinery under the general law for the transmission of the property of the deceased. I agree with these submissions and hold that there is nothing in sub-s. (4) which prevents the application of sub-s. (1) of s. 26 of the Constitution to the provision of law under consideration.

I accordingly hold that s. 9 of the Indian Acts (Amendment) Act, in so far as it has the effect of precluding the application of the Indian Probate and Administration Act to Africans, is discriminatory and that in accordance with s. 14 (1) of the Constitution of Kenya (Amendment) Act 1964, the provision must be construed as if the Indian Probate and Administration Act were mentioned in sub-s. (2) of the section, or with such other modification as would have the same effect. So far as the present application is concerned, I direct that letters of administration intestate shall issue to the applicant as prayed.

Application allowed.

For the applicant:

MK Bhandari

Bhandari and Bhandari, Nairobi

For the Attorney General of Kenya as amicus curiae:

KD Potter, QC (Special Legal and Constitutional Adviser, Kenya), and *SM Kivuitu* (State Counsel, Kenya)

Fernandes v Kericho Liquor Licensing Court
[1968] 1 EA 640 (HCK)

Division: High Court of Kenya at Kisumu

Date of judgment: 20 March 1968.

Case Number: 7/1967 (119/68)

Before: Chanan Singh J

Sourced by: LawAfrica

[1] *Constitutional Law – Citizenship – Used as a ground for the refusal of the renewal of a liquor licence – Whether such ground a disqualification under Liquor Licensing Act (Cap. 121), s. 16 (a) (K.).*

[2] *Licensing – Liquor licensing – Refusal – Refusal of renewal of liquor licence on ground of lack of citizenship – Whether a competent ground of refusal under Liquor Licensing Act (Cap. 121), s. 16 – Observations on procedure (K.).*

Editor's Summary

The appellant's application for the renewal of a general retail liquor licence was refused by the Kericho Liquor Licensing Court on the ground that preference was given to Kenya citizens. The appeal was brought on the ground that the Licensing Court had power to refuse the renewal only on the applicant's suffering from one of the six disqualifications set out in s. 16 Liquor Licensing Act, which did not include lack of citizenship.

Held –

- (i) the renewal was clearly refused on the ground that the appellant was not a Kenya citizen and that was not a disqualification for the purposes of the Liquor Licensing Act;
- (ii) the appellant's application was therefore illegally refused;
- (iii) the licence should be renewed by the court under its powers conferred by s. 18 (2) of the Act.

Observations as to the procedure to be followed by a liquor licensing court.

Appeal allowed with costs.

Case referred to:

- (1) *Re Mulchand Punja Shah*, [1958] E.A. 587.

Judgment

Chanan Singh J: This is an appeal from a decision of the Kericho liquor licensing court refusing the renewal of a general retail liquor licence to the appellant, Mr. D. V. Fernandes.

The memorandum of appeal and certain other documents were filed by the appellant but no affidavit or documents in reply were filed by the respondent court. A cyclostyled copy of the minutes of the licensing court was obtained by the District Registrar and was on the court file. This was known to the advocates of the two sides, and Mr. D. B. Kholi, for the appellant, quoted from the minutes without objection from state counsel.

On November 6, 1967, the appellant received from the District Commissioner, Kericho, a cyclostyled circular No.: Z.69/II/23 addressed "To all non-Africans liquor licence holder, Kericho district." This read as follows:

"You are requested to forward photostat copy of your Kenya citizenship to this office for checking before Liquor Licensing Court sits on November 13, 1967, to consider grant of your new renewal liquor licence for 1968. Failure to produce the required documents your application may not be given appropriate consideration."

Mr. Fernandes sent a reply to this communication two days later in the following terms:

“Reference your letter No.: Z.69/II/23 of 6th instant, I have to inform you that I have not applied for Kenya citizenship.

I am running the bar since 1953 and have got immovable property in Kericho to the value of £12,000.”

The application of Mr. Fernandes for a renewal of his licence was turned down and on November 15, 1967, Messrs. Kohli, Patel and Raichura, advocates for the appellant, wrote to the president of the Kericho district liquor licensing court asking for “a certified copy of the liquor licensing court’s order” as they had been instructed to file an appeal “because the renewal of his aforesaid liquor licence was refused on the ground that he was not a citizen of Kenya although he is the owner of the premises and has had a licence since 1953”.

The District Commissioner’s reply to this letter was dated December, 7 1967, and read as follows:

“I refer to your above quoted letter and wish to inform you that your client’s application for renewal of liquor licence was not approved by the liquor licensing court. The preference was given to Kenya citizens.”

Mr. Kohli argued on the basis of these documents that the decision of the liquor licensing court was contrary to law. He relied for this contention on s. 16 of the Liquor Licensing Act (Cap. 121) which says that “A licensing court may refuse to renew an existing licence only when such court is satisfied that” the applicant suffers from one or more of the six specified disqualifications. Three of these disqualifications relate to the applicant in person, one to the manner in which his business has been conducted, one to the condition of premises, and one to the conditions attached to the licence under which he operated in the past. There is nothing in the correspondence which suggests that the appellant suffered from any of the six disqualifications. Mr. Kohli drew particular attention to the word “only” in this section which, he argued, suggested that for no other reason could the renewal of a licence be refused. He invited the attention of the court to the case of *Re Mulchand Punja Shah*, [1958] E.A. 587. In that case the renewal of a licence had been refused on the ground that the applicant was “not a fit and proper person to hold the licence” as provided by s. 16 (a). The applicant there was reported to have two convictions unconnected with the Act. The applicant had not appeared at the sessions of the liquor licensing court and the court had not informed him of the nature of the objection which it had taken of its own motion or given him an opportunity of replying to it as required by s. 12 (2) of the Act. The decision of the court was communicated to the applicant and he moved the Supreme Court (as the High Court was then called) for an order of certiorari to quash the order of the licensing court refusing his application and for an order of mandamus requiring the court to hear and determine the said application according to law. The procedure by way of appeal to the High Court was available to aggrieved parties then as it is now, but Mr. Mulchand Punja Shah was not informed of the decision of the court until it was too late to file an appeal and he was compelled to apply for the two orders as mentioned. Mr. Kohli drew my particular attention to two passages in the judgment. One reads ([1958] E.A. at p. 589):

“Section 16 provides the conditions under which a licensing court, may refuse to renew a liquor licence and enacts that a licensing court may refuse to renew an existing licence only when it is satisfied that one or more of six specific circumstances exist.”

The second passage is the following:

“... under s. 16 the licensing court is not entitled to refuse the renewal of an existing licence on the ground that there is no longer a need for the licence in the particular locality.”

It was argued in that case that the licensing court was entitled to refuse the renewal of the licence because the applicant was “not a fit and proper person” within the meaning of cl. (a) of s. 16. It was held, however, that the licensing court had no jurisdiction or power to refuse to grant the renewal of the licence on the ground stated in s. 16 (a) without first informing the applicant of its objection and giving him an opportunity to answer it as provided in s. 12 (2).

Mr. Sehmi opposed the present appeal on the ground that, under s. 12 (1) of the Liquor Licensing Act, a licensing court is entitled of its own motion to raise an objection against a particular application and that the court’s objection on the ground of Kenya citizenship was validly taken. He referred to sub-s. 2 of the same section which says that a court raising an objection should inform the applicant of the nature of the objection and should, if a request is made by the applicant, adjourn the hearing of the application to enable the applicant to reply to the objection. Mr. Sehmi said that in this case no application for adjournment was made and that, therefore, the appellant must be taken to have accepted the validity of the objection.

Mr. Sehmi realised that s. 16 is so worded as to exclude the possibility of any objection except one founded on the specific provisions of that section. He, therefore, argued that the licensing court had in mind the ground for refusal of renewal described in s. 16 (a), namely: “A licensee is not a fit and proper person to hold the licence.”

I do not think this argument helps the case of the respondent. First, the appellant was never informed by the licensing court as required by s. 12 (2) that the court did not regard him a fit and proper person to hold a licence. In my opinion, a demand for the production of a Kenya citizenship certificate would not amount to an objection on the ground that the applicant was “not a fit and proper person”. If a court does seriously believe that an applicant is not a fit and proper person, then it is only right that he should be told so in specific terms. Secondly, I think the expression “fit and proper” refers to the personal qualities of an applicant and not to his national status.

It is quite clear that the renewal of the licence in this case was refused on the ground that the appellant was not a Kenya citizen. That, however, is no disqualification for the purposes of the liquor licensing law. No other disqualification is imputed to the appellant. I, therefore, hold that the appellant’s application for a renewal of his licence was illegally refused. Under the power conferred upon me by s. 18 (2) of the Act, I hereby grant the renewal of his general retail liquor licence in respect of plot No. 295, section IV, in Kericho. I give the appellant the costs of this appeal.

Appeal allowed with costs.

For the appellant:

DV Raichura

Kohli, Patel & Raichura, Kisumu

For the respondent:

RS Sehmi

Attorney-General, Kenya

[1968] 1 EA 643 (HCT)

Division: High Court of Tanzania at Mwanza
Date of judgment: 25 January 1968
Case Number: 1/1967 (120/68)
Before: Mustafa J
Sourced by: LawAfrica

[1] *Appeal – Ex parte Judgment – Application for revision of setting aside of ex parte judgment – Proper procedure by way of appeal – Civil Procedure Code 1966, s. 75 (T.).*

[2] *Civil Practice and procedure revision – Ex parte judgment – Application for revision of setting aside of ex parte judgment – Proper procedure by way of appeal – Civil Procedure Code, 1966, s. 75 (T.).*

[3] *Civil Practice and procedure – Ex parte judgment – Granted without written application by the plaintiff – Civil Procedure Code 1966, O. 8, r. 14 (2) (T.).*

Editor's Summary

The applicant was granted an *ex parte* judgment on October 6, 1966, by the senior resident magistrate's Court and on January 5, 1967, the *ex parte* judgment was set aside by the same magistrate on the application of the respondent dated December 22, 1966. The applicant applied by way of revision for the setting aside of the senior resident magistrate's order setting aside the *ex parte* judgment on the grounds that: (1) the magistrate acted illegally or with material irregularity in allowing the application without sufficient reason recognised by the law, and (2) the magistrate acted without jurisdiction in that he allowed an application made after thirty days of the passing of the judgment or decree.

Held –

- (i) as no application in writing was made by the plaintiff in terms of O. 8, r. 14 (2) of the Civil Procedure Code, the *ex parte* judgment itself was granted in error;
- (ii) the learned magistrate acted within his jurisdiction in setting aside the *ex parte* decree;
- (iii) the application for revision was misconceived in view of the right to appeal under s. 75 of the Civil Procedure Code.

Application dismissed.

Cases referred to in judgment:

- (1) *Balakrishna v. Vasudeva* (1917), 44 I.A. 261.
- (2) *Amir Hassan Khan v. Sheo Baksh Singh* (1884), 11 Cal. 6; 11 I.A. 237.

Judgment

Mustafa J: This is an application by Mr. Matemba (hereinafter called the applicant) by way of revision

of an order of the senior resident magistrate, Mwanza. It appears the applicant filed a case against the respondent/defendant (hereinafter called the respondent) in the resident magistrate's court being Civil Case No. 620 of 1966. A summons by way of summons for orders under r. 8 of the Subordinate Courts (Civil Procedure-Summons and Pleading) Rules 1955 (now O. 8, r. 14 (2) of the Civil Procedure Code) was served on the respondent. The summons for orders was dated September 12, 1966, and the respondent was notified to file a written statement of defence in duplicate within twenty-one days of service of the summons upon him. The summons was served upon the respondent on September 21, 1966, and it appears the case was mentioned before the court on October 6, 1966 when it was

recorded: “In the absence of the defendant who has been duly served, judgment for plaintiff as prayed with costs and interest”, i.e., judgment *ex parte* was there-upon entered for the applicant. The applicant later applied for the execution of the decree and an application by the respondent to set aside the *ex parte* judgment was made on December 22, 1966; and this application was heard on January 5, 1967, when the same magistrate allowed the application and set aside the *ex parte* judgment and rescinded an order for proclamation of sale which had by then been made.

The applicant now applies by way of revision to set aside the senior resident magistrate’s order setting aside the *ex parte* judgment. The grounds are: (1) the magistrate acted illegally and/or with material irregularity in allowing the application without sufficient reason recognised by law, and (2) the magistrate acted without jurisdiction in that he allowed an application made after thirty days of the passing of the judgment and decree.

The applicant argues that in terms of art. 164 in the First Schedule of the Indian Limitation Act as applied to Tanzania, the period of limitation for setting aside an *ex parte* judgment is thirty days from the date of the decree. He argues since the *ex parte* judgment was given on October 6, 1966, thirty days had elapsed when the first application to set it aside was made on December 22, 1966. He argues the court has no jurisdiction to enlarge time. He also appears to state that the reasons given by the learned trial magistrate allowing the application to set aside the *ex parte* judgment are insufficient and are not recognised by law.

On the face of it, it appears to me that the *ex parte* judgment given on October 6, 1966 was made without jurisdiction. Order 8, r. 14 (2) of the Civil Procedure Code reads:

- “14. (1)
- (2) In any case in which a defendant who is required under sub-r. (2) of r. to present his written statement of defence fails to do so within the period specified in the summons or, where such period has been extended in accordance with the proviso to that sub-rule, within the period of such extension, the court may –
- (a) where the claim is for a liquidated sum not exceeding one-thousand shillings, upon application in writing by the plaintiff and upon proof by affidavit or oral evidence of service of the summons, enter judgment in favour of the plaintiff without requiring him to prove his claim;
- (b) in any other case, upon application in writing by the plaintiff, fix a day for *ex parte* proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim.”

In this case, the claim was for Shs. 720/- and there does not appear to be any application in writing by the plaintiff in terms of sub-para. (a) *supra*. The summons was served on the respondent on September 21, 1966 in which he was notified to submit a written statement of defence within twenty-one days. But on October 6, 1966, i.e., fifteen days after the service and before the expiry of the time for filing a written statement of defence, *ex parte* judgment was entered against him. In the circumstances, it would appear that the *ex parte* judgment itself is in error.

Again, in an application for revision, the High Court has no power to interfere except in the three cases mentioned in s. 79 of the Civil Procedure Code. Section 79 reads:

- “79. (1) The High Court may call for the record of any case which has been decided by any court subordinate to the High Court and in which no appeal lies thereto, and if such subordinate court appears –

- (a) to have exercised a jurisdiction not vested in it by law; or
 - (b) to have failed to exercise a jurisdiction so vested; or
 - (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
- the High Court may make such order in the case as it thinks fit.”

The High Court has only to see whether the requirements of the law have been duly and properly obeyed by the court whose order is the subject of revision. As was observed by their Lordships of the Privy Council in *Balakrishna v. Vasudeva* ((1917), 44 I.A. 261):

“It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.”

This refers to s. 115 of the Indian Civil Procedure Code which is the same as s. 79 of our Civil Procedure Code.

As regards alleged illegality or material irregularity urged by the applicant, according to the case *Amir Hassan Khan v. Sheo Baksh Singh* (1885), 11 Cal. 6; 11 I.A. 237 – a Privy Council case – it is settled that where a court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity because it has come to an erroneous decision on a question of fact or even of law.

In this case, the learned magistrate acted within his jurisdiction in setting aside the *ex parte* decree, and even if I agree with the advocate for the applicant that he came to a wrong decision on a point of law, that is no reason at all for this Court to revise his order. A High Court will not interfere under this section merely because a lower court allowed an application which was barred by limitation.

Again, the applicant has stated that he has applied by way of revision because he is precluded from appealing from the order of the trial magistrate. He refers to Mulla’s Civil Procedure Code (10th Edn.), p. 605, where in a commentary on O. 9, r. 13 of the Indian Civil Procedure Code which refers to the setting aside of *ex parte* decrees there is this passage:

“If, in a case open to appeal, an application under this rule is dismissed an application lies from the order dismissing the application, whether the dismissal was on merits or for default. But where the application is granted, no appeal lies from the order granting the application.”

Applicant therefore states that he is entitled to apply for revision to this Court as he is precluded from appealing. However, on the same page of Mulla’s Civil Procedure Code under the heading Revision, this passage occurs:

“It has been held by the High Court of Allahabad that an order setting aside an *ex parte* decree is not subject to revision under s. 115, the reason given being the validity of the order may be attacked under s. 105 in an appeal from the final decree.”

Section 105 (1) is more or less the same as s. 75 of our Civil Procedure Code.

In my view, the application by way of revision has no merit and is misconceived.

The application is dismissed. As the respondent has not appeared, I will make no order as to costs.

Application dismissed.

The applicant in person.

The respondent was not represented and did not appear.

Matemba v Matemba
[1968] 1 EA 646 (HCT)

Division: High Court of Tanzania at Dar-Es Salaam
Date of judgment: 10 May 1968
Case Number: 1/1968 (122/68)
Before: Georges CJ
Sourced by: LawAfrica

[1] Civil Practice and Procedure – Judgment – Alteration – When judgment can be altered – Judgment pronounced but no order signed – Civil Procedure Code 1966, s. 3; O. 20, r. 3 (T.).

[2] Matrimonial Causes – Decree – Making decree absolute – Application by respondent for – Discretion of court – Petitioner opposing application – Matrimonial Causes Ordinance (Cap. 364), s. 16 (3) (T.).

[3] Matrimonial Causes – Decree – Rescission – Whether court can rescind a decree once granted – Grounds for exercise of discretion – Matrimonial Causes Ordinance (Cap. 364), s. 3 (T.).

[4] Matrimonial Causes – Service – Service of answer alleging adultery on woman named – Effect of failure to serve – Whether decree nisi a nullity – Matrimonial Causes Ordinance, s. 40.

[5] Matrimonial Causes – Withdrawal of petition – Answer proceeded with after petition “withdrawn” – Whether decree nisi a nullity – Proper procedure to be followed.

Editor’s Summary

The husband petitioned for a divorce from his wife on the ground of her cruelty. In her answer the wife denied the charges of cruelty and prayed for a judicial separation on the ground of the husband’s adultery with the woman named, which the husband had admitted in his petition and in respect of which he had filed a discretion statement. At the hearing the wife amended her answer to pray for divorce instead of judicial separation. The husband then “withdrew” his petition. The wife was granted a decree nisi of divorce, which the husband now applied to have made absolute. This application was opposed by the wife, on religious grounds, she having changed her mind since the hearing; and she asked for the decree nisi to be rescinded. It was also argued on her behalf that the decree was a nullity because of procedural defects (chiefly the failure to serve the answer on the woman named) and because the answer, having no existence separate from the petition, ceased to exist when the petition was with-drawn so that no order could be made on it.

Held –

- (a) (i) the Court has a discretion to rescind a decree nisi (*Rutter v. Rutter* (1) applied);

- (ii) this discretion in this case should be exercised in favour of making the decree nisi absolute; but,
- (b) (i) the proper procedure where the petitioner does not want to continue with the petition is to order that it be stayed and not proceeded with except by leave of the Court (*Schira v. Schira* (6) and *Sandler v. Sandler* (7) adopted);
- (ii) although judgment had been pronounced it had not been incorporated in a formal signed order; therefore,
- (iii) the Court could, (*Raichand Lakhamshi v. Assanand & Sons* (9) followed) and should, alter its order to an order staying the petition;
- (c) (i) the woman named should have been served; but the failure to serve her did not make the proceedings thereafter a nullity (*Stanga v. Stanga* (14) not adopted; observations of Lord Denning in *Balloqui v. Balloqui* (11) adopted);

- (ii) the defect should be cured by ordering service of the answer, as amended, on the woman named.

Copy of answer ordered to be served on the woman named. In the absence of intervention by her, case to be re-listed for making decree absolute.

Cases referred to in judgment:

- (1) *Rutter v. Rutter*, [1921] P. 421.
- (2) *Daglish v. Daglish*, [1936] P. 49.
- (3) *Griffiths v. Griffiths* (1912), 28 T.L.R. 281; 106 L.T. 646.
- (4) *Davies v. Davies*, [1955] 3 All E.R. 588.
- (5) *Jeffrey v. Jeffrey* (No. 1), [1950] 2 All E.R. 449.
- (6) *Schira v. Schira and Sampajo* (1868), L.R. I.P. & D. 466.
- (7) *Sandler v. Sandler*, [1934] P. 149.
- (8) *Bhagwan Din v. Gopal Das and Others* (1933), A.I.R. Oudh 385.
- (9) *Raichand Lakhamshi and Another v. Assanand & Sons*, [1957] E.A. 82 (C.A.).
- (10) *Re Harrison's Settlement*, [1955] 1 All E.R. 185.
- (11) *Balloqui v. Balloqui*, [1964] 1 W.L.R. 82.
- (12) *Wiseman v. Wiseman*, [1953] P. 79.
- (13) *Gore Booth v. Gore Booth*, [1954] P. 1.
- (14) *Stanga v. Stanga*, [1954] 2 All E.R. 16.
- (15) *In re Pritchard v. Deacon*, [1963] 1 Ch. 502.
- (16) *Craig v. Kanssen*, [1943] 1 K.B. 256.
- (17) *Watts v. Watts*, [1959] 2 All E.R. 687.

Judgment

Georges CJ: This is an application by the husband respondent, against whom a decree nisi for dissolution was granted, to have that decree made absolute. The husband had petitioned for divorce on the ground of cruelty, and in her answer the wife denied the charges, and prayed for judicial separation on the ground of her husband's adultery with a woman named Sycheria Dioniz. This had been admitted in the husband's statement asking for the exercise of the Court's discretion in his favour. At the hearing, on an application by advocate appearing for the wife, the answer was amended and a prayer for divorce substituted for the original prayer for judicial separation, and it is on this that the decree nisi was granted. Certain orders for maintenance and costs were made by consent.

The wife has opposed this application to have the decree made absolute and has asked that it be rescinded. In her petition she stated that she is and has always been a Roman Catholic, that she believed

in the indissolubility of marriage, that she had asked for a divorce at the hearing on the advice of her advocate, that such a course would help in solving her problems and that in her state of confusion she had agreed without taking enough time to think the matter over. Subsequently, she has been intensely unhappy as she realised the serious error into which she had fallen. The Mother Superior and Sisters at a Convent where she was then staying were indignant.

Thereafter, she had taken all steps to see that the decree should be rescinded. Mentally she had been upset and under tension. Her father had stopped writing to her. She ended by stating that she wished to seek reconciliation with her husband.

Paragraph 18 of her affidavit reads:

“Divorce to me is unthinkable, it is against my religion, against my conscience and against my unbringing.”

Paragraph 20 reads:

“I have made a mistake and I deeply regret it, and I most fervently wish to be fully forgiven by the Church and to live at peace with my conscience; for this reason, I wish to draw the attention of the Honourable Court to what I have stated in annexure ‘B’ hereto.”

Annexure “B” is a letter dated March 10, 1968, addressed to the Chief Justice by the wife, stating that she was withholding her consent to the divorce because she had realised that:

“Civil divorce in its strict and narrow sense would not only presume to derogate from a canonical and established matrimony, but also place the other partner in a position to attempt a second marriage as long as I was still living, and thereby both before God and before the Catholic Church to which I belong and by whose prescriptions I was wedded to him, I should be held greatly responsible for this attempted marriage were he required to produce a Court certificate of divorce to show that he was free to marry, whereas canonically and as a matter of fact he would not be free to marry until death do us part.”

It remains to be noted that the decree nisi was granted on August 17, 1967. Lump sum maintenance of Shs. 12,500/- was ordered. On August 19, 1967, the appellant swore an affidavit stating the maintenance was too low and that it should be increased and provision be made that the maintenance should increase as the husband’s means increased. This application does not seem to have come up for hearing.

I accept that this Court has jurisdiction to rescind a decree nisi which it has granted. In this case, the jurisdiction can be placed on two separate grounds.

The Matrimonial Causes Ordinance (Cap. 364), s. 3 states that:

“Jurisdiction under this Ordinance shall, subject to the provisions of this Ordinance or any rules made under the Ordinance, be exercised by the High Court in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England.”

The High Court of Justice in England had the power at the date of the enactment of the Ordinance – April 1, 1956 – to rescind a decree nisi and make no further order or to pass instead a decree for judicial separation.

In *Rutter v. Rutter*, [1921] P. 421, it was held that the Court had power to rescind a decree nisi on the application of the party who had obtained it.

In *Daglish v. Daglish*, [1936] P. 49, the court exercised that power of rescission and made instead an order for judicial separation.

Apart from this basis, the application for the decree absolute is presented by the party against whom the decree nisi was granted. The right to do this is provided for by s. 16 (3) of the Ordinance, and this states that on such an application:

“The Court shall . . . have power to make the decree absolute, reverse the decree nisi, require further enquiry, or otherwise deal with the case as the Court thinks fit.”

Under what circumstances should the power to rescind be exercised? There is precedent in England for its having been exercised because the wife as a Roman Catholic did not wish a divorce to go through: *Griffiths v. Griffiths* (1912), 106 L.T. 646.

The circumstances were not closely analysed, and indeed in the course of the argument, Evans, P., is reported as saving:

“Has a guilty husband any right to come here and say what remedy his wife should have?”

In *Daglish v. Daglish* (*supra*), it was exercised because the wife did not wish her husband to remarry and possibly have children who would then take shares under a settlement by which the remainder after a life estate to the husband would go to his children by his present or any future wife. The husband did not oppose the application.

In *Davies v. Davies*, [1955] 3 All E.R. 588, the power was exercised because the wife wished to preserve her right to remain with the children in the matrimonial home. This she would lose if there was a divorce, but not if there was a judicial separation. The husband did not oppose.

In that case, the Court quoted with approval the words of Pearce, J., in *Jeffrey v. Jeffrey* (No. 1), [1950] 2 All E.R. 449:

“It is obviously undesirable to allow a petitioner wife to use delay in applying for a decree nisi of divorce to be made absolute or to accede to her application for an alteration in the form of decree to enable her to put pressure on a respondent husband to receive from him a financial advantage. There might be circumstances where justice is served by altering a decree nisi of dissolution to a decree of judicial separation. The judge has a complete discretion under the new subsection. How that discretion should be exercised must depend entirely on the circumstances of the case.”

Section 16 (3) of the Matrimonial Causes Act appears to give an equally wide discretion.

I think that times have changed since the decision in *Griffiths v. Griffiths* (*supra*), and I do not think it reasonable any longer to think that a guilty husband should have no right to be heard on the remedy his wife should have. The Court must, naturally, respect the diverse religious sensibilities of parties who appear as litigants and take them into account in arriving at a just decision.

Far more important, however, it would seem to me, is the question as to whether or not the marriage has broken down – whether there is any real hope of reconciliation – whether the financial interests of the wife could be more adequately protected by granting only judicial separation and not divorce or by rescinding the decree altogether.

While the wife may feel that she would have in some way contributed to the sin if the husband should remarry, the problem remains whether he, an advocate of thirty-four, if the dates on the marriage certificate are to be accepted, should be required to remain celibate or continue an irregular union because the wife now wishes to change her mind as a result of her religious sensibilities. It would not be unkind to say that if divorce was as unthinkable to her as alleged in her affidavit, she would never have agreed to the amendment of her petition. What seems more likely is that, since the event, the mother superior and the sisters have impressed upon her the gravity of the step. There is no doubt that the wife has tried all she could since then to have it reversed. If she fails, one can only hope that the Church with its capacity for forgiveness will pardon her one error and make it possible for her to regain the peace of mind she now has lost. And she, on her part, need not remarry, in conformity with the precepts of the Church. I do not think that there is any prospect of reconciliation in this marriage. There are no children. The financial interests of the wife do not require keeping the broken marriage legally alive. With time I have no doubt that the wife can learn to live with the situation.

I would, therefore, exercise my discretion in favour of making the decree nisi for divorce absolute if the only grounds available were those discussed above.

In the course of argument, however, on the day of hearing, it appeared that the decree nisi could be attacked on other grounds. Accordingly, I adjourned the matter to allow advocates on both sides to prepare documents and arguments setting out and opposing these grounds.

They can be classed under two heads:

- (a) that there were defects in the proceedings which made them a nullity; and
- (b) that an order had been made granting leave to withdraw the petition and that consequently the answer, which had no separate existence apart from the petition, ceased to exist and no order could be made on the prayer set out therein.

Although Mr. Raithatha pressed head (a) more vigorously, it might perhaps be more convenient to deal with point (b) first.

The petition was heard before me. On application of advocate for the petitioner, I did grant leave to withdraw the petition. The record bears the note, "Leave to withdraw petition granted".

Thereafter the respondent-wife gave evidence to establish the adultery alleged. In a short judgment, I accepted her evidence and pronounced the decree nisi and other consequential orders which had been agreed upon. This judgment does not mention the fact of the withdrawal of the petition.

Later, a formal order was drawn up for the decree nisi. This also does not mention the fact that the original petition had been withdrawn. It reads:

"This cause coming on the 17th day of August 1967 for hearing before the Honourable the Chief Justice, Mr. P. T. Georges, in the presence of [respective advocates] it is ordered that unless appearance is entered by any person to show cause to the contrary the marriage between the parties . . . be dissolved."

It is clear on the English authorities which appear to be correct in principle that an answer cannot survive the withdrawal of a petition. The proper procedure where the petitioner does not wish to continue with the petition is to order that it be stayed and not be proceeded with except by leave of the Court. This leaves the answer on record and prayers contained therein may be considered and granted: see *Schira v. Schira and Sampajo* (1868), L.R. 1 P. & D. 466, approved in *Sandler v. Sandler*, [1934] P. 149.

The order granting leave to withdraw the petition would seem to be a judgment within the meaning of the Civil Procedure Code 1966, s. 3. The definition there given is the same as that in the Indian Civil Procedure Code, which was formerly applicable in Tanganyika. Though the commentary in Chitale and Rao (2nd Edn.) p. 50, states that "the essential element of a judgment is that there should be a statement of the grounds of decision", it goes on to add that an order deciding a preliminary issue may be a judgment.

In *Bhagwan Din v. Gopal Das and Others*, it was held that an order setting aside an *ex parte* judgment was a judgment within the meaning of the Code. The Court stated ((1933), A.I.R. Oudh at p. 386):

"[The case] was disposed of by a short order, but that order was surely a judgment within the meaning of s. 2 (9) of the Civil Procedure Code."

On the basis that the order was a judgment, the question is whether under O. 20, r. 3 of the Civil Procedure Code 1966, this judgment, having been dated and signed thereafter, cannot be altered or added to save as provided by s. 96 or on review.

Section 96 is not applicable in this case. Nor indeed was the order signed. It was recorded and pronounced. In those circumstances, it would seem to me that the mere failure to sign should not be held as significant and it should be treated as if it had in fact been signed on the day pronounced.

I am prepared to hold, however, that I do have the power now to alter this order.

In *Raichand Lakhamshi and Another v. Assanand & Sons*, [1957] E.A. 82, the Court of Appeal adopted the rule laid down in England in the case of *Re Harrison's Settlement* in these words ([1955] 1 All E.R. at pp. 188 and 192):

“We think that an order pronounced by a judge can always be withdrawn or altered or modified by him until it is drawn up, passed and entered. In the meantime, it is provisionally effective and can be treated as a subsisting order in cases where the justice of the case requires it and the right of withdrawal would not be thereby prevented, or prejudiced.”

“When a judge has pronounced judgment, he retains control over the case until the order giving effect to his judgment is formally completed. This control must be used in accordance with his discretion exercised judicially and not capriciously.”

It is clear that what was intended was that the answer should be proceeded with and not the petition. The order for granting leave to withdraw was never formally drawn up, nor was it incorporated, as indeed it should have been, in the formal order for the decree nisi. It can, therefore, be altered, and I now alter it to an order staying the petition and providing that it be not proceeded with except by leave of the Court – the procedure laid down in *Schira v. Schira* (*supra*).

It may be argued that on making the order for leave to withdraw, the petition was no more, and accordingly there was nothing to be revived and stayed. I would not accept this argument. The order until perfected is only provisionally effective – always subject to recall until perfected.

There remains the question of irregularities in the proceedings. In his affidavit, Mr. Raithatha lists several irregularities:

- (1) That the answer had not been served on the woman named, Sycheria Dioniz, contrary to s. 40 of the Matrimonial Causes Ordinance and r. 15 (1) of the Matrimonial Causes Rules;
- (2) No affidavit of service on Sycheria Dioniz has been filed as required by r. 10 of the said Rules;
- (3) The application for amendment submitted by the respondent was not in writing as required by r. 14 of the said Rules;
- (4) The application by the respondent striking out her prayer for judicial separation was not supported by an affidavit stating that there was no collusion;
- (5) The petitioner's application for leave to withdraw his petition was not in writing and was not supported by an affidavit stating that there was no collusion.

Points 3, 4 and 5 were not seriously pressed.

The application for leave to amend was made in the presence of the other party. It alleged no new facts. It was merely a change of prayer. The petitioner, who was present, did not object, and the leave was granted. Rule 14 (2) makes it clear that the procedure there laid down shall be followed unless otherwise directed. Though there was no positive direction in this case, the course pursued

indicated that there was tacit direction that it be followed, and full consent by both parties. I do not think that an affidavit on collusion is required where only the prayer is changed. Rule 14 (2) states that an application for leave to amend:

“shall be supported by an affidavit verifying the new facts alleged and deposed, *in so far as those new facts are concerned*, to the existence or otherwise of collusion, connivance and condonation in the manner required by r. 6 in the case of the original petition.”

No new facts were alleged and consequently no affidavit was required. Similarly, the application for leave to withdraw needed no affidavit nor would the proper application for leave to stay the petition and not proceed with it except with leave of the Court.

The important defects are those set out in (1) and (2). The original answer was never served on Sycheria Dioniz, nor, of course, was the amendment.

Mr. Raithatha argues that the failure to serve the woman named is a breach not only of the Matrimonial Causes Rules, but of the Ordinance itself. This breach makes the proceedings a nullity and the decree nisi must be rescinded.

It may be well to set out s. 40 of the Ordinance in full:

“Every petition under this Ordinance shall be served on the party to be affected thereby either within or without the Territory, in such manner as may be prescribed by the Court or as the Court may by general or special order from time to time direct.”

Mr. Rattansey argued that a woman named was not a “person to be affected” within the meaning of the section. He contended that the word “party” must mean party to the suit and a woman named is not usually a party to the suit until she has been given leave to intervene. I cannot accept this interpretation. I would hold that a woman named is a party to be affected by the petition.

My view, however, is that the failure to serve the woman named in this case does not make the whole proceedings thereafter a nullity. It is an irregularity which can be cured by the exercise of the inherent powers of the Court.

It should in the first place be noted that s. 40 of the Matrimonial Causes Ordinance lays down that a petition must be served as prescribed by the Court. If, therefore, a petition has been served but not as prescribed by the Court, then there is as clear a breach of the section as if the petition had not been served at all.

The later authorities in England establish beyond doubt that where proceedings have not been served in accordance with the Matrimonial Causes Rules, such failure is a mere irregularity and the Court has a discretion either to set aside all orders made subsequent to the irregularity or to take steps to correct the irregularity and validate steps taken thereafter, acting under powers conferred by O. 70, r. 1 of the Rules of the Supreme Court. This is so because the irregularity does not make the proceedings void but merely voidable. They are not a mere nullity.

There had been a trend of authority seeking to establish that failure to serve in the proper manner a party who ought to be served would make the proceedings a nullity. That trend has been checked, and in my view properly so. To grant to the Court a discretion to be judicially exercised in setting aside or correcting proceedings in which errors have occurred is much more likely to do justice than to create hard and fast rules requiring that proceedings be deemed a nullity should any particular lapse occur. The matter was dealt with obiter by Lord Denning, M.R., in *Balloqui v. Balloqui*, [1964] 1 W.L.R. 83.

In that case, the wife had had a history of mental illness. The husband served a petition on her at a time when she was out of mental hospital. She behaved oddly when the petition was served and abused him. The petition was for divorce on the grounds of cruelty. There was a prayer for discretion to be exercised as the husband had himself committed adultery. After service, the husband did not take steps to have a guardian ad litem appointed to look after the wife's interests. The wife did not enter an appearance and the petition went through undefended. The husband got his decree. Later the wife's sister had herself appointed guardian and sought to have the decree set aside on the ground that the husband must have had reasonable ground for believing that the wife was mentally ill when he served the petition on her and that he should have taken steps to have a guardian appointed.

On the facts, all three judges of the Court of Appeal held that the wife's condition then had not been proved to be such that the husband should have had reasonable cause for thinking her mentally ill.

Lord Denning, M.R., went on to say that even if that had been proved, he would not have set aside the decree. He said, in part, as follows:

"In *Wiseman v. Wiseman*, [1953] P. 79, this Court held that where there had been no service at all on an individual and a decree absolute made, it was not void ab initio; it was not a nullity, but it could be set aside if it was thought fit. In that case, it was set aside because there had been something quite discreditable on the part of the petitioner in the way that service was not effected. It was set aside as a matter of discretion and not because it was a nullity."

He held that in two earlier cases – *Gore Booth v. Gore Booth*, [1954] P. 1 and *Stanga v. Stanga*, [1954] 2 All E.R. 16 – the attention of the Court had not been drawn to O. 70, r. 1, of the Rules of the Supreme Court. In both these cases petitions had been served directly on infants instead of on their fathers or guardians as prescribed by the relevant rule. Further, when the infants did not enter appearance, no steps had been taken to have a guardian ad litem appointed. In each case, the infant was the respondent.

It had been held in both cases that the rule was mandatory and that failure to observe it vitiated the whole proceedings. In *Stanga v. Stanga*, counsel for the petitioner-husband did not even seek to argue that the rule was not mandatory.

In *Balloqui v. Balloqui*, Lord Denning, M.R., held that even if he had been satisfied that the wife had been mentally ill when served, he would still have exercised his discretion in favour of the husband and upheld the decree. Largely, he was influenced by the fact that the husband had remarried, that his new wife was pregnant, that the divorced wife was back in a mental home and that adequate financial provision could be made for her even though the decree had been made against her. Danckwerts, L.J., agreed with Lord Denning, M.R.; Donovan, L.J., disagreed. He held that on the hypothesis that the wife had been mentally ill when served, he could not exercise his discretion in favour of the husband, because the wife:

"never had a chance to defend herself, nor of bringing a cross-petition on the ground of the husband's admitted adultery, and for me that consideration is fundamental and decisive. I think that if she were under a disability, she ought not to be deprived for ever of such a chance of defending herself."

This difference of opinion indicates quite clearly that there can be no validity in any distinction between improper service and failure to serve.

One of the authorities to which Mr. Raithatha referred in his able argument was *In re Pritchard v. Deacon*, [1963] 1 Ch. 502.

This was a case in which proceedings were commenced by an originating summons issued from a district registry which had no authority to issue such a summons. All originating summonses had to be issued by the Central Office of the High Court.

In that case Upjohn, L.J., discussed the judgment of Lord Greene, M.R., in *Craig v. Kanssen*, [1943] 1 K.B. 256. His view was that a clear distinction should be made between proceedings which were a nullity and those with an irregularity so grave that the party affected could insist on having them set aside *ex debito justitiae*, if he wished to apply. Into this category cases of non-service can fall. Where the defendant insists that they should be set aside, they must be. The proceedings themselves remain not void but voidable.

An illustration might perhaps illumine the principle. Without fraud, a plaintiff obtains a judgment by default against a defendant who in fact has never been served. The defendant hears of the judgment for the first time when steps are taken to have it executed. He can immediately apply to have it set aside, and *ex debito justitiae* it must be. The defendant could, however, apply instead for a stay of execution and for payment by instalments. If this is granted and later, the defendant having defaulted in payment of his instalments, execution is again levied, there would seem to be no reason why the original judgment should be set aside. Any principle which would make proceedings a nullity for non-service would fail to accommodate a case such as this where there could very well be no justice in setting aside the order. On the other hand, if the proceedings are held to be voidable not void, the Court in its discretion could examine all the factors and reach a just decision.

Upjohn, L.J., in that case stated three categories of proceedings which are nullities:

- “(1) Proceedings which ought to have been served but have never come to the notice of the defendant at all. This, of course, does not include cases of substituted service or service by filing in default or cases where service has been properly dispensed with.
- (2) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings.
- (3) Proceedings which appear to be duly issued but fail to comply with a statutory requirement.”

It is my view that the present case does not fall into any of these categories. For reasons which I have attempted to set out above, I would not include non-service resulting in failure to bring the action to the notice of the defendant as a basis for declaring proceedings a nullity. Even if it is valid, however, the person who has not been served here is not the defendant, and it is not the person not served who is applying to have the proceedings set aside.

There are no fundamental defects in the proceedings. As far as there can be a failure to comply with a statutory requirement, i.e., service as set out in s. 40 of the Matrimonial Causes Ordinance, the English authorities discussed above seem to make it clear that in matrimonial causes at least, failure to serve as laid down by the Rules is not a fundamental defect. In any event, the failure to comply with a statutory requirement mentioned in category (3) cannot be intended to include a statutory requirement to serve, as this must be included in category (1).

I think the defect here is remediable, and I am fortified in this conclusion by the case of *Watts v. Watts*, [1959] 2 All E.R. 687.

In that case, by inadvertence, the woman named, who was an infant was served with a petition. She was then only seventeen. The petition ought to have been served on her father – according to the rules for service prescribed by the Court under the Matrimonial Causes Act. The fact that there had been no proper service escaped the attention of everyone until it was brought to the notice of the Court by the Queen's Proctor.

Sachs, J., held that service on the woman named was mandatory and he acted under the proviso to the English Matrimonial Rule 66 which allows service on an infant to be deemed good service. He felt that he was still bound by the decisions in *Stanga v. Stanga* and could not act under the observations of Lord Denning, M.R., in *Balloqui v. Balloqui* because they were clearly obiter. The rigidities of stare decisis do not bind this Court as far as English decisions are concerned, and it would be open to me to hold that this Court could act under its inherent power to make such orders as may be necessary for the ends of justice, as Lord Denning, M.R., held that the English Court could act under O. 70, r. 1. In that case, the infant's father, who was in Court, stated that he had had the benefit of advice from a solicitor. He knew that his daughter had received the petition and that it was in her best interests not to dispute it. He stated that if served, he would enter appearance and waive all objections to any prior absence of proper service. In those circumstances, he was appointed guardian ad litem, entered a general appearance, stated that he wished to waive the irregularity, and the decree was then made absolute. In that case, of course, neither the petitioner nor the respondent was opposing the grant of the decree absolute, but that fact is of no importance. Of cardinal importance is the fact that despite the absence of proper service, the proceedings were not treated as a nullity. The purported service was null and void, but the proceedings themselves were merely irregular and capable of being amended.

Accordingly I would order that a copy of the answer in this proceeding, as amended, be served on Sycheria Dioniz. If after the proper period for seeking leave to intervene has elapsed she fails to seek leave to do so, then the appropriate affidavit of service on the woman named shall be filed. If she does intervene, then clearly she must be allowed an opportunity to defend herself against the allegations made against her, and the decree nisi will be set aside to allow her to do so. If she does not, then the matter shall be again placed before me for making the decree absolute, unless cause can be shown why I should not exercise my discretion in favour of the applicant.

The question of costs is reserved until the final disposal of this application.

Order accordingly.

For the petitioner:

MN Rattansey

Mohamud N Rattansey & Co, Dar-es-Salaam

For the respondent:

MJ Raithatha

MJ Raithatha, Dar-es-Salaam

Division: High Court of Tanzania at Dar-Es-Salaam
Date of judgment: 25 May 1968
Case Number: 9/1968 (129/68)
Before: Saidi J
Sourced by: LawAfrica

[1] Criminal Practice and Procedure – Transfer – Transfer of case from one magistrate to another – Case part – heard – Applicant dissatisfied with order in which witnesses called – Whether High Court should order case to be transferred – Test to be applied – Criminal Procedure Code (Cap. 16), s. 80 (T.).

Editor's Summary

The accused, while being tried on a charge with stealing a bicycle, became dissatisfied with the order in which the prosecution witnesses gave evidence and applied for the case to be transferred to another magistrate. The trial magistrate having forwarded the file to the High Court for directions.

Held –

- (i) before a transfer of any trial is granted on the application of an accused person a clear case must be made out that the accused person has a reasonable apprehension in his mind that he will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred (*Herman Milde v. R.* (1) and *Bhag Singh v. R.* (3) followed);
- (ii) there was nothing arising from the facts of the case or the attitude of the magistrate that could be taken to indicate that the accused would not have a fair and impartial trial.

Application for transfer refused. Magistrate directed to continue the trial.

Cases referred to in judgment:

- (1) *Herman Milde v. R.* (1937), 1 T.L.R. (R.) 129.
- (2) *Baktu Singh v. Kali Prasad* (1900), 28 Cal. 297.
- (3) *Bhag Singh v. R.* (1941), 1 T.L.R. (R.) 133.

Judgment

Saidi J: This is an application for a transfer of a part-heard case from the trial magistrate to another.

The accused is charged with stealing a Raleigh bicycle and some other articles which were on the bicycle, all of which are the property of the Newala District Council. From the facts it would appear that the bicycle was snatched from the hands of Herbert Mtumbati, an employee of the Newala District Council, by two unknown persons on the night of February 28, 1968, when he was pushing it along the road on his way back from Nanguruwe village, where he had been collecting local rates. Herbert did not recognise either of the two thieves because it was dark, and it was also raining at that time. He immediately reported to the police. On March 22, 1968, Special Constable Salum Salum and Police

Constable Emmanuel arrested the accused when they met him on the road pushing a Raleigh bicycle which looked like the one reported stolen. Subsequent investigation confirmed that this was the bicycle that was stolen from Herbert.

The trial of the accused started on April 8, 1968, when Salum and Emmanuel gave evidence. It was adjourned to April 16, when Herbert gave evidence.

When the accused was called upon to cross-examine Herbert he said the following:

“I do not see why this witness did not give evidence first as he appears to have been the complainant. Therefore I pray the court that my case should be heard by another magistrate. That is all.”

As a result the learned district magistrate adjourned the hearing to the following day for a ruling, which is as follows:

“This court has serious doubts about the lawfulness of the request of the accused to transfer the case to another magistrate at this stage on the ground that [Herbert] was not called as the first witness. But in order to avoid any injustice, the court is forwarding the case file to the High Court for direction.”

In brief, this is how the record came to be forwarded to this Court.

It is difficult to ascertain from the record whether or not the learned district magistrate had examined the provisions of s. 80 of the Criminal Procedural Code, which deals with situations in which an accused may apply for a transfer of his trial from one magistrate to another. I can see no reference to this section in the record. The section reads as follows:

- “80. (1) Whenever it is made to appear to the High Court:
- (a) that a fair and impartial inquiry or trial cannot be had in any court subordinate thereto; or
 - (b) that some question of law or unusual difficulty is likely to arise; or
 - (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same; or
 - (d) that an order under this section will tend to the general convenience of the parties or witnesses; or
 - (e) that such an order is expedient for the ends of justice or is required by any provision of this Code,
- it may order:
- (i) that any offence be inquired into or tried by any court not empowered under the preceding sections of this Part but in other respects competent to inquire into or try such offence;
 - (ii) that any particular criminal case or class of cases be transferred from any court subordinate to its authority to any other court of equal or superior jurisdiction;
 - (iii) that an accused person be committed for trial to itself.
- (2) The High Court may act either on the report of the lower court or on the application of a party interested or on its own initiative.
- (3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit.
- (4) Every accused person making any such application shall give to the Director of Public Prosecutions notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.
- (5) When an accused person makes any such application the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor.”

It does not appear to me that the ground stated by the accused in his application before the learned district magistrate for a transfer of his trial to another magistrate is one that is specifically covered by s. 80. Before a transfer of any

trial is granted on the application of an accused person a clear case must be made out that the accused person has a reasonable apprehension in his mind that he will not have a fair and impartial trial before the magistrate from whom he wants the trial transferred.

The test to be applied in such a matter was very lucidly expressed by Wilson, J., in *Herman Milde v. R.* (1937), 1 T.L.R. (R.) 129. In that case the accused was charged with failing to provide his servants with proper medicines and medical attention during illness. He was tried by a magistrate who was also an administrative officer. He applied for a transfer of the case to another magistrate, and in his application he impugned the impartiality of the magistrate, alleging that as he was an administrative officer, part of whose duty it was to obtain from employers compliance with the provisions of the Master and Native Servants Ordinance, and in the district where he worked there had been several deaths of servants arising largely from a lack of medical attention, and he had, in his capacity as an administrative officer, publicly advocated enhanced penalties to employers who had failed in their duty towards their sick servants, he would in such circumstances be highly biased against any employer charged with that offence. After reviewing the facts of that case and examining the authorities relied on by counsel, Wilson, J., dismissed the application of the accused for a transfer of the case and held:

“Further. That the test as to whether a change of venue should be granted is the proved existence of distinct incidents giving rise to a reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial before the magistrate in question.”

In reaching that decision Wilson, J., also relied on the case of *Baktu Singh v. Kali Prasad* where Ameer Ali, J., said the following ((1900), 28 Cal. at p. 301):

“We entirely endorse the observations of the learned Judges but it will be noticed that they refer in explicit terms to the occurrence of incidents giving rise to a reasonable apprehension in the mind of the accused that he would not receive a fair or unprejudiced trial. The learned Judges point out that it is not every apprehension which would be taken into consideration but that the apprehension must be of a reasonable character and must be founded upon distinct incidents (to paraphrase their language) which would really give rise to a reasonable apprehension that there would not be a fair trial.”

A similar application for the transfer of a part-heard case from one magistrate to another was considered by Wilson, J., in *Bhag Singh v. R.* ((1941), 1 T.L.R. (R.) 133). In that case the trial had proceeded a considerable way before the application for stay of the hearing and transfer of the trial to another magistrate was made. The whole of the prosecution case, in which four witnesses gave evidence, had been heard, and the accused himself and one of his defence witnesses had given evidence. The application for transfer was made on three grounds:

- (i) that the trial magistrate in his capacity as an administrative officer was also, under s. 7 (3) of the Police Ordinance 1937, the officer in charge of police in his district.
- (ii) that a complaint against the magistrate in his administrative capacity had been made to his official superior by some persons of the same community as the accused, including the accused's partner in business.
- (iii) that at the trial the magistrate questioned the accused, when in the witness box, very searchingly and at considerable length.

Having examined the facts of that case and considered the arguments of counsel

and the authority on which he relied, Wilson, J., refused the application for the transfer of the case and held:

“That the test of whether a change of venue should be granted is not whether the magistrate is actually prejudiced against the accused, but whether there exists in the mind of the accused a reasonable apprehension that he will not have a fair and unprejudiced trial before the magistrate in question, and that in deciding what is a reasonable apprehension regard must be had not to abstract standards of reasonableness but to the standard of honesty and impartiality of the accused himself and his degree of education and intelligence.”

I am in full agreement with the views of Wilson, J., in both cases and I am convinced that exactly the same test is fittingly applicable to the present case. There is nothing arising from the facts of the case or the attitude of the learned district magistrate that could be taken to indicate that the accused will not have a fair and impartial trial. In fact the learned district magistrate has been as impartial and fair in this trial as any magistrate could ever be, and the accused has in no way or manner whatsoever impugned his impartiality or conduct. If I understand the accused properly, his complaint is that the third witness called by the prosecution at his trial should have been the first witness. Personally I can see nothing wrong with the order in which the witnesses were called. Furthermore, the third witness called by the prosecution said practically nothing against the accused, except to identify the bicycle found in the accused's possession as the one which belonged to his employers, the Newala District Council, and which was snatched from his hands by two thieves at night when he was pushing it along the road. He specifically said, “I did not know the persons who stole the bicycle”. He further said, “I had the bicycle on the night I met thieves. They took it from me. They were two. They took it by force. They ran away after pulling it from me”. The evidence of the two constables who were called first identified the accused as the person who had been found by them in possession of the bicycle that had been reported stolen.

In conclusion I would only say that the accused has practically no ground for complaint, nor any ground on which he can validly apply for a transfer of his trial from the learned district magistrate who is hearing the case, to another magistrate. There is practically nothing in the facts of the case that could give him a reasonable apprehension for thinking that he would not have a fair and impartial trial from the learned district magistrate who is hearing his case. To repeat what Wilson, J., pointed out in the two cases in which similar applications were refused, “it is hardly necessary to remind the accused that should he feel aggrieved at the eventual decision of his case he has his remedy by way of petition of appeal or revision to this Court”.

I would accordingly refuse the accused's application for a transfer of the case and return the record to the learned district magistrate directing him to continue the trial from the stage it had reached.

Order accordingly.

Neither party appeared or was represented.

D'Silva v Republic
[1968] 1 EA 660 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam

Date of judgment: 24 May 1968

Case Number: 167/1968 (130/68)

Before: Hamlyn J

Sourced by: LawAfrica

[1] Evidence – Ministerial order – How to be proved – Whether evidence of Principal Secretary as to existence of order made by Minister sufficient or whether Minister should be called.

[2] Evidence – Immigration – Prohibited immigrant failing to comply with lawful requirement of the Principal Immigration Officer to leave Tanganyika – How requirement is to be proved – Whether evidence of Principal Immigration Officer sufficient – Immigration Act (Cap. 534), s. 23 (1) (j) (T.).

[3] Immigration – Prohibited immigrant – Failure to comply with lawful requirement of Principal Immigration Officer to leave Tanganyika – How requirement is to be proved – Immigration Act (Cap. 534), s. 23 (1) (j) (T.).

Editor’s Summary

The appellant was declared a prohibited immigrant and ordered to leave Tanganyika within fourteen days by a notice issued by the Principal Immigration Officer on the instructions of the Ministry of Home Affairs. He disobeyed the notice and was convicted of failing to comply with a lawful requirement of the Principal Immigration Officer to leave Tanganyika. He appealed; and the main point raised on appeal was whether the order declaring him a prohibited immigrant had been sufficiently proved. The existence of the order made by the Ministry of Home Affairs upon the basis of which the Principal Immigration Officer issued the notice was testified to by the Principal Secretary to the Ministry of Home Affairs. The appellant argued that this was insufficient and that the Minister himself should have been called to give evidence.

Held – the order had been properly proved by the evidence of the Principal Secretary and there was no need for the Minister himself to give evidence. The evidence of the Principal Immigration Officer that he issued his notice upon being informed of the existence of the Ministerial order sufficed.

Appeal dismissed.

No cases referred to in judgment

Judgment

Hamlyn J: The appellant was convicted in the Dar-es-Salaam district court of an offence of failing to comply with the lawful requirement of the Principal Immigration Officer to leave Tanganyika, contrary to s. 23 (1) (j) of the Immigration Act 1963 (Cap. 534). That section reads:

- “23. (1) Any person who commits any of the following acts or omissions shall be guilty of an offence against this Act, namely any person who –
- (j) being a prohibited immigrant, fails to comply with a lawful requirement of the Principal Immigration Officer to leave Tanganyika.”

It is not, I think, in dispute that the Principal Immigration Officer, on instructions from the Ministry of

Home Affairs, issued a prohibited immigrant notice on November 14, 1967. This notice is on the record and sets out that the Minister for Home Affairs had declared the appellant to be an undesirable immigrant and that he was ordered to leave Tanganyika within fourteen days from November 14, 1967. The notice is clear and unequivocal. It is not in

dispute that the appellant did not leave within the stipulated period but overstayed it; he was therefore prosecuted.

The memorandum of appeal sets out a number of contentions why the conviction is wrong in law the first being that there was no “legal proof” of the alleged declaration by the Minister of Home Affairs that the appellant had been declared an undesirable immigrant by him. With respect, I do not think that this contention has any substance at all.

Part 11 of the Act provides for dealing with “prohibited immigrants” and s. 6 defines such persons. Subsection (f) of that section defines a prohibited immigrant as:

“A person who, in consequence of information received from any Government or any other source deemed by the Minister or the Principal Immigration Officer to be reliable, is declared by the Minister or the Principal Immigration Officer to be an undesirable immigrant.”

There follows a proviso which is not applicable to the present case, the declaration having been made in this instance by the Minister himself. The appellant contends that something more is required than the form (exhibit “A”) to prove that the Minister actually made the order concerning the appellant and that there should be some proof that the document before the court is not a false one. This point does not appear to have been specifically raised in cross-examination of the Principal Immigration Officer who gave evidence at the trial though some questions were asked as to the Minister’s Order. Apart from this, I consider that the learned trial magistrate was correct in not requiring direct evidence as to the Ministerial order. The notice issued by the Principal Immigration Officer specifies that such order had been made and in the absence of any indication to the contrary the court was entitled to assume that every necessary administrative act leading up to the issue of the notice had been duly carried out.

The Principal Immigration Officer, in his evidence at the trial, stated that he was informed of the Minister’s decision by telephone and on such information he issued the notice (exhibit “A”). The Principal Secretary to the Ministry of Home Affairs (who was called by the defence as a witness) enlarged on this, for he says:

“I know the Minister issued an order that the accused should leave the country.”

He then went on to say that such order was “a written order and was with the Minister.”

Now the Principal Secretary is, as it were, the mouthpiece of the Minister himself; it is he who normally communicates ministerial decisions to both the public and members of the Ministry serving under him. It appears to me therefore completely proper that, when the Minister makes an order in his official capacity, the Principal Secretary should be the person to communicate the terms of the order to the officer whose duty it is to put such order into effect. Nor is there necessity for the Minister himself to give evidence of the existence of the order, for that is the duty of the Principal Secretary. There is of course in this case no contention by the defence that the order on which the notice was made was obtained in some improper manner from the Minister, or that the signature thereon was not the signature of the Minister. Such being the case, I hold that the defence was not entitled to call the Minister himself to give evidence as to the making of the order, but that the evidence of the Principal Immigration Officer that he issued his notice upon being informed of the existence of the Ministerial order sufficed.

The remaining matters raised in the memorandum of appeal of the appellant can now be dealt with quite briefly, nor do I find any real substance in them.

Once the notice to a prohibited immigrant was issued by the Principal Immigration Officer to the appellant, what subsequently occurred had no bearing on the matter. The endorsement dated November 22, 1967 clearly did not effect a suspension of the notice or of the order, for it reads:

“I have decided that the order should stand unless and until evidence is brought to discredit the allegations of Mganga and Calvalo.”

That the appellant may have experienced difficulty in discrediting such allegations is neither here nor there in this appeal. The endorsement placed the onus of disproving allegations upon the appellant and until he did so the order (and consequently the notice) remained effective. It therefore followed that the ensuing events referred to in the memorandum were the natural consequence of the appellant not acting in accordance with the terms of the notice. I would add that the appellant had a period of six days from the date of the endorsement until the expiry of the fourteen days given him by the notice to set on foot enquiries with regard to the “allegations”. In that time he certainly could have made arrangements for investigations to be started by him and continued by other persons on his behalf into the matter.

In my view there is no substance at all in this appeal and the terms of the Principal Immigration Officer’s notice were explicit. The memorandum did nothing to set aside the notice and it was explicitly worded to avoid doing this.

I consequently dismiss this appeal and uphold the judgment of the learned resident magistrate.

Appeal dismissed.

For the appellant:

PR Dustur

PR Dustur, Dar-es-Salaam

For the respondent:

Laxman (State Attorney, Tanzania)

Attorney General, Tanzania

Abilah v Republic
[1968] 1 EA 662 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	7 June 1968
Case Number:	258/1968 (131/68)
Before:	Saidi J
Sourced by:	LawAfrica

[1] *Criminal Law – Disobedience of lawful orders – Whether offence extends to failure to comply with*

order of court to pay costs in a civil case – Penal Code (Cap. 16), s. 124 (T.).

Editor's Summary

The appellant, as unsuccessful party in a civil suit, was ordered to pay the costs of that suit to the other party. He failed to do so. He was then charged with and convicted of disobeying a lawful order under s. 124 of the Penal Code. On appeal to the High Court:

Held – failure to pay a debt found due by a court is not an offence under Penal Code, s. 124.

Appeal allowed. Conviction quashed.

Cases referred to in judgment:

- (1) *Lala Das v. Mina Mal and Chhajju Mal* (1922), 4 Lah. L.J. 266.
- (2) *Barrett v. Hammond* (1878), 10 Ch.D. 285
- (3) *Marris v. Ingram* (1879), 13 Ch.D. 338

Judgment

Saidi J: In this case the appellant is appealing against his conviction in the district court at Lindi for the offence of disobeying a lawful order, contrary to s. 124 of the Penal Code, and a fine of Shs. 200/- or four months' imprisonment in default of payment of the fine. The particulars of the offence allege that:

“The person charged on the 11th day of March 1968 at about 11.45 hrs. in the district court of Lindi, Mtwara Region, did disobediently and unlawfully refuse to pay Shs. 529/50 costs vide Civil Case No. 99/66.”

This matter appears to have arisen from a shamba that the appellant had sold to a man called Hassan Issa. As there was a dispute over the matter of delivering possession to Hassan Issa, he sued the appellant in the resident magistrate's court at Lindi in Civil Case No. 99 of 1966. He obtained judgment on September 19, 1967, giving him vacant possession of the shamba, with costs which totalled Shs. 529/50. These proceedings do not concern the question of possession of the shamba but the costs awarded to him. It appears that he tried to execute the decree against the appellant to recover his costs, and it is said that he moved the court in this respect. Exactly what the court did is not known, but the record shows that a letter was written to the appellant by the court on October 7, 1967, asking him to pay the costs to Hassan Issa. As the appellant did not pay, a reminder was sent to him by the court on January 29, 1968. Following his failure to pay the costs or reply to the letters from the court, an order for his arrest was made by the learned district magistrate, and thereafter he was charged with this offence.

There is not the slightest doubt that the offence in this case was utterly misconceived by the learned district magistrate, and I do hope that no action of this kind will ever be repeated. There is a special method laid down in the Civil Procedure Code for recovery of civil debts, and at no stage should a civil case be turned into a criminal matter, apart from contempt of court by any of the parties. What the learned magistrate should have done in this case was either to issue notice to the appellant under O. 21, r. 35 of the Civil Procedure Code 1966, to show cause why he should not be arrested and detained in civil prison for failure to pay the decretal amount, or to attach his property under O. 21, r. 42 with a view to its being sold to realise the decretal amount out of the proceeds of sale, or to attach his salary under O. 21 r. 47, if he is employed, to recover the same. On these three occasions the decree holder, that is Hassan Issa, would have to pay court fees for execution before any step was taken by the court. It is therefore not at all clear why the learned district magistrate departed from this well known procedure provided by law and decided to follow another procedure utterly unknown in civil practice.

Failure to pay a debt is not an offence in law. The creditor may of course go to court for a remedy to have the debtor compelled to pay his money. After obtaining judgment he can execute the decree against the debtor to recover his money, and there is a law which provides for the procedure to be followed. Even if the debtor is arrested on his application and is found to be without means to pay the debt, he cannot be sent to a civil prison: *Lala Das v. Mina Mal and Chhajju Mal* (1922), 4 Lah. L.J. 266. A debtor would be sent to civil prison if the court, after inquiring into his financial standing, were satisfied that he can pay the debt and is refusing to do so. The purpose of committing a fraudulent and dishonest debtor to civil prison is not, as such, to punish him, but it is, I think, an attempt to force him to pay the debt: *Barrett v. Hammond* (1878), 10 Ch.D. 285. Therefore a debtor who has no means of paying the debt found due by the court need not be committed to a civil jail, as no useful purpose would be served by imprisoning him: *Marris v. Ingram* (1879), 13 Ch.D. 338 at p. 343. It is still a matter of strong argument as to whether there is any moral justification for the penalty, so to call it, of imprisonment for non-payment of

one's due debts. The English Debtors Act of 1869 abolished this penalty in cases of honest debtors, i.e., debtors who are proved to have no means of payment, but left it open for fraudulent or dishonest debtors, i.e., debtors who have ample means of payment and merely refuse to pay their debts, to be committed to civil prison on the motion of their creditors. Such committal is intended to put pressure on them to pay their debts. The contention here is, why take this course at all? If these debtors are proved to have means of paying the debts, then why not attach those means and have them sold to realise the debts? In the event they happen to have fraudulently disposed of those means, is there anything wrong in following them up to the hands of those who have received them? It cannot, therefore, be said that there are no alternative measures, other than commitment to civil jail, that can be taken by the court to obtain payment of debts by debtors who are proved to have the means of paying.

The offence created by s. 124 of the Penal Code is of a general character but seems to be very limited in scope. This is one of the sections of the Penal Code whose scope has been very often misunderstood by magistrates. The section reads:

“124. Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf, is guilty of a misdemeanour, and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience, to imprisonment for two years.”

Quite clearly, as I have already pointed out, failure to pay a debt found due by the court is not an offence, nor was it ever meant to be so. That is as it should be, because a lot of reasons could be given by one failing to pay his debts. He may have no means of paying at all, and it cannot be expected that society should consider it an offence when a person cannot pay a debt because he has no means of doing so. It is always a risk in itself to lend one's money to another, or to give credit of any kind, because it may later prove impossible to recover. And this must have been what Shakespeare had in mind when he said in Hamlet, Act 1, scene 3: “Neither a borrower nor a lender be.”

I should also point out here that there are numerous court orders non-compliance with which could not amount to an offence within the meaning of s. 124 of the Penal Code. If that were not so, many persons would have been punished time and again for their failure to comply with court orders. I could give a lot of examples: a person who fails to call a witness after being allowed to do so by the court, or who fails to pay the costs of the other side when he has asked for an adjournment, or who fails to attend on the date set down for the hearing, or who fails to appear at the hearing of his appeal after having been duly notified of the date of hearing, or who fails to produce documents of other papers in his possession after notice to produce is served on him by the court, etc. Non-compliance with these and many other court orders does not constitute a breach of the Penal Code or of any other law. Of course, the person who does not comply with such orders or directions may be penalised in other ways, either by having his case dismissed for non-prosecution, or default of appearance, or insufficient evidence, and so on, but he cannot be charged with an offence as happened in this case.

For the foregoing reasons the purported conviction in this case is quashed and the sentence is set aside. If the fine or any part of it has been paid by the appellant it should be refunded to him.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

Lubuwa (State Attorney, Tanzania)
Attorney-General, Tanzania

Mohamed v Republic
[1968] 1 EA 665 (HCT)

Division: High Court of Tanzania at Dar-Es-Salaam
Date of judgment: 31 July 1968
Case Number: 315/1968 (132/68)
Before: Duff J
Sourced by: LawAfrica

[1] *Criminal Law – Stealing – By agent – Necessity for proof of fraudulent intent – Driver taking load of maize to his own house “because it was raining” – Penal Code (Cap. 16), ss. 273 (b) and 275 (I).*

Editor’s Summary

The appellant, a driver, was convicted of stealing a load of maize. He said in evidence that he had taken the maize to his own house and there off-loaded it “because it was raining”; and that he had kept it there for several days (without telling the owner of it, or his own employers) because he was expecting the maize to dry. On appeal to the High Court:

Held – there was not sufficient evidence from which to conclude that necessary fraudulent intention had been established (*R. v. Langan* (1) distinguished).

Appeal allowed. Conviction quashed.

Case referred to.

(1) *R. v. William Thomas Langan* (1954), 2 T.L.R. (R) 96.

Judgment

Duff J: The appellant was convicted of stealing by agent, contrary to ss. 273 (b) and 265 of the Penal Code, the property belonging to a registered co-operative union; and the minimum sentence of two years imprisonment was imposed, together with the statutory twenty-four strokes of corporal punishment, a scheduled offence within the meaning of the Minimum Sentences Act (Cap. 526) being involved.

The facts of the case are somewhat strange. The appellant was employed as a driver, and on September 6, 1967, he was directed to collect and deliver seventy-seven bags of maize valued at Shs. 3,049/-. The produce was loaded into his vehicle on the particular day, but nothing was heard of the load until September 15, 1967, when an official of the transport company which employed the appellant questioned him about the particular load. The appellant informed him that the bags were in his house, where he had left them because it was raining, and this was also the explanation given by the appellant to

a committee member of the co-operative society to whom the produce belonged, the latter questioning the appellant on the same date after payment had not been given to the society for the maize. The appellant, in an affirmed statement, said that he had off-loaded the sacks of maize at his house because it was raining, while it was also late at night. He did not take them to their destination earlier because he was expecting the sacks to dry. This version was in keeping with what he had told some of the prosecution witnesses. He denied that he ever had an intention of stealing the property, while he also referred to the fact that some labourers had assisted him in the off-loading of the bags at his premises.

In his judgment the learned magistrate stated that the whole crux of the case was whether the action of the appellant could be considered fraudulent and concluded that, because the appellant had kept the maize for a period of nine days without saying anything, his intention was fraudulent. In reaching this conclusion the learned magistrate referred to the decision in *R. v. William Thomas Langan* (1954), 2 T.L.R. (R) 96. The accused in that case was found

in possession of an internal combustion engine which had been removed from the workshops of the Overseas Food Corporation, the accused maintaining that he had the engine at his home merely for the purpose of repairing it. However there was evidence in that case, which was accepted by the learned magistrate, that the accused had offered this engine for sale, and it was therefore clear that he was treating it as his own property. The present case could not be compared with the Langan case because, leaving aside the question of detention of the maize in the appellant's house, there was nothing to indicate that the necessary fraudulent intent was present. If the appellant had secreted the maize elsewhere or not enlisted the aid of his labourers in off-loading it at his premises, it possibly would have strengthened the case against him. The learned magistrate in his judgment also referred to the fact that it was suggested that the maize was wet because it had rained on the particular date, the learned magistrate opining that Dodoma officially has no rain in the month of September and that it could not have rained for seven or eight days continuously in Dodoma even during the rainy season. I do not know how these matters came to the knowledge of the learned magistrate. There was certainly no evidence adduced before the court from which it could be safely concluded that it had not rained at the material time as suggested by the appellant.

Undoubtedly the conduct of the appellant in not disclosing to his employers or to the co-operative society concerned that he had kept the maize at his house would give rise to suspicion, but this in my view is not sufficient from which to conclude that the necessary fraudulent intention had been established. I do not agree, as learned State Attorney submitted, that the appellant intended to misappropriate the property, and in the circumstances I consider that it would be most unsafe to uphold the conviction.

The appeal must therefore be allowed. The conviction is quashed and the sentence set aside, the appellant to be released forthwith unless otherwise lawfully held.

Appeal allowed.

The appellant did not appear and was not represented.

For the respondent:

Laxman (State Attorney, Tanzania)

Attorney-General, Tanzania

Makubi v Republic
[1968] 1 EA 667 (HCT)

Division:	High Court of Tanzania at Dar-Es-Salaam
Date of judgment:	2 August 1968
Case Number:	335/1968 (133/68)
Before:	Hamlyn J
Sourced by:	LawAfrica

[1] *Criminal Law – Corruption – Intention – Accused offering bribe to get Village Executive Officer to abstain from counting other people’s cattle as those of accused for purposes of rate – Whether accused acting “corruptly” – Prevention of Corruption Ordinance (Cap. 400), s. 3 (2) (T.).*

Editor’s Summary

The accused offered money to a village executive officer who was engaged in counting cattle for the purpose of a local rate. He was charged with corruption (and also, on other facts, with escaping from lawful custody). On his plea the accused said that he had given the money as an inducement to the executive officer not to include other person’s cattle with those of the accused, which the executive officer was proposing to do. This was entered by the trial magistrate as a plea of “guilty”. On appeal to the High Court:

Held –

- (i) the plea was not properly entered as a plea of “guilty”;
- (ii) it is a necessary ingredient of the offence of corruption that the act should be done corruptly, i.e., with an “evil mind” (*R. v. Jetha* (1) and *Mandla v. Republic* applied); but
- (iii) it was clear that there was no “evil mind” on the part of the appellant. Appeal allowed (in part). Conviction of corruption quashed.

Cases referred to in judgment:

- (1) *R. v. Akbarali K. Jetha* (1947), 14 E.A.C.A. 122.
- (2) *Mandla v. Republic*, [1966] E.A. 315.
- (3) *Re Bradford Election Petition* (No. 2) (1869), 19 L.T. 723.

Judgment

Hamlyn J: The appellant was charged with offences of corruption contrary to s. 3 (2) of the Prevention of Corruption Ordinance and with escape from lawful custody contrary to s. 116 of the Penal Code. He was convicted of each of these offences after the court had entered pleas of “guilty” on the record.

The petition of appeal is a little curious, in that it confines itself to the first count only; it does not refer to the offence of “escape” in any way. In it the appellant speaks of “cattle stealing” and claims that “there was no witness who appeared before the court to testify that I was real (sic) seen stealing the alleged animals”. Whatever the appellant intended in replying to the charge on the first count, he seems to have been completely unaware of the nature of the offence as contained in the charge.

After recording pleas of “guilty” the trial magistrate set out a summary of the facts, to which the appellant agreed. From this summary, it appears that the appellant is a herdsman and on the material date was visited by the village executive officer for the purpose of counting the appellant’s livestock. It appears that, in that locality, a local rate is imposed by the council, based on the number of cattle owned by each person. The village executive officer informed the appellant of what he intended to do and proceeded with his count. The appellant

informed him however that the herd contained the cattle of neighbours, and that consequently the assessment should be based only upon those beasts which were his property. It seems that the village executive officer told the appellant that, since the cattle were all in his “kraal” he would be assessed upon the total number of animals found there. This seems to have been a most unreasonable method of the village executive officer carrying out the duty upon which he was engaged and one would have thought that an investigation would have been made to determine the truth or otherwise of the appellant’s contention.

Be that as it may, on hearing this the appellant is said to have gone inside his house and returned to the executive officer with a twenty shilling currency-note which he handed to the officer with the request that he abstain from including the cattle said to belong to the neighbours in the total count. The village executive officer thereupon arrested the appellant (presumably upon a charge of corruption) and handed him over to the primary court messenger. He was taken by the messenger to the primary court, but on the way decamped. More than a month later he was re-arrested and brought before the court on the two charges already referred to. Upon entering pleas of “guilty” in respect of each charge he was sentenced to two years’ imprisonment and to twenty-four strokes of corporal punishment on the corruption count and to two months’ imprisonment (running concurrently with the first sentence) for escape from lawful custody.

In so far as the count for corruption is concerned the appellant upon being charged is recorded as saying:

“I gave the 20/- because he wanted to count my cattle including some of another man which happened to come to my group of cattle. I wanted him not to count them. I gave him the money as an inducement not to include the other cattle which were of another man.”

This explanation was entered by the trial magistrate as a plea of “guilty” to that count of the charge.

Section 3 (2) of the Prevention of Corruption Ordinance makes it an offence for any person corruptly to give, promise or offer any consideration as any inducement or reward for an agent to do or forbear to do anything in relation to his principal’s affairs. A necessary ingredient of the offence is that the act shall be done “corruptly”. Is it clear that the act of the appellant in handing to the village executive officer the Shs. 20/- currency-note was a “corrupt act”? It is certainly a most injudicious one and the appellant’s remedy was clearly to appeal to some higher executive authority against a count and assessment which he claimed to be incorrect.

The Prevention of Corruption Ordinance, while requiring the transaction to be “corrupt”, does not contain an interpretation of such requirement. In *R. v. Akbarali K. Jetha* (1947), 14 E.A.C.A. 122, the Court of Appeal observed:

“The essence of the offence of official corruption is the motive which animates the giver. If he gives either on account of some past act or omission in his favour, or with the hope and expectation that his gift may so influence the donee that something may thereafter be done or omitted in his favour, the offence is complete.”

That case was one of those referred to in *Mandla v. Republic*, where the meaning of the word “corrupt” was discussed, and the court said ([1966] E.A. at p. 318):

“... the appellant’s state of mind, which in our view includes motive and intention seems to us to be an essential and material factor in determining whether in making the payment. he was acting corruptly or not”

and the court referred to the case of *Re Bradford Election Petition (No. 2)* (1869), 19 L.T. 723, in which the meaning of the word “corruptly” was considered and in which the court said:

“Now what is the meaning of that word ‘corruptly?’ It is difficult to tell, but I am satisfied that it means a thing done with an evil mind or evil intention; and except there be an evil mind or an evil intention accompanying the act, it is not corruptly done.”

In the instant case it seems clear that there was no “evil mind” on the part of the appellant. The dictionary meaning of “corrupt” in this sense is to induce to act dishonestly or unfaithfully and in no sense can the appellant be said to have acted thus. It is true that his offer of the Shs. 20/- currency note laid itself open to such interpretation at first sight and the trial magistrate clearly interpreted it in such manner. The reply of the appellant to the charge was not in fact an unequivocal plea of “guilty” for nowhere does he admit to this essential element of his act being “corruptly” done. This being so, the matter should have been more fully explained to him by the court and perhaps it would have removed from his mind the confusion which (from the wording of the petition of appeal) even now exists as to the nature of the charge.

The appeal, in so far as the first count is concerned, must be and is hereby allowed, for the plea entered by the appellant was no plea of “guilty” at all. Furthermore on the facts as given by the prosecutor and admitted by the appellant, an essential part of the offence was absent.

As to the second count of escape from lawful custody the appellant does not appear to have appealed against his conviction or sentence – at least his petition of appeal is silent upon this matter. The record shows that an unequivocal plea of “guilty” was entered and all the ingredients of such offence are shown to have existed. In any event the sentence of two months’ imprisonment has long since been served.

I therefore order that the appeal in respect of the first count be allowed. The appellant is to be released from custody forthwith unless lawfully held in some other matter, conviction and sentence on that count being quashed.

Appeal allowed on first count.

The appellant did not appear and was not represented.

For the respondent:

Laxman (State Attorney, Tanzania)

Attorney-General, Tanzania

Nanjibhai Prabhudas & Co Ltd v Standard Bank Ltd [1968] 1 EA 670 (HCK)

Division:	High Court of Kenya at Nairobi; Court of Appeal at Mombasa
Date of judgment:	2 December 1967
Case Number:	245/1965 (116/68) and 13/1968 (114/68)
Before:	Harris J, Sir Charles Newbold P, Sir Clement de Lestang V-P and Law JA

[1] *Civil Practice and Procedure – Irregularities – Waiver – Appearance – Delay – Effect of entry of unconditional appearance and of delay upon irregular service – Whether waived.*

[2] *Civil Practice and Procedure – Delay – Irregular service – Whether delay in bringing on motion to set aside service amounts to waiver.*

[3] *Civil Practice and Procedure – Seal – Seal of court – Seal of wrong court affixed to summons – Whether summons a nullity – Civil Procedure (Revised) Rules 1948, O. 5, rr. 1 (3) and 7 (K.).*

[4] *Civil Practice and Procedure – Service – Out of jurisdiction – Kenya summons to be served in Uganda – Order made for service in Uganda through Uganda district court – Summons and not notice of summons served in Uganda – Whether service good – Civil Procedure (Revised) Rules 1948, O. 5, rr. 25 and 26 (K.).*

[5] *Civil Practice and Procedure – Service – Out of jurisdiction – Notice of summons or summons – Whether service of summons from Kenya court in Uganda on Uganda defendant instead of notice of summons is regular – Civil Procedure (Revised) Rules 1948, O. 5, rr. 25 and 26.*

[6] *Civil Practice and Procedure – Extension of time for filing defence – After decree – Whether Court can extend time for filing defence after issue of decree.*

[7] *Statutes – Independence – Service of civil process – Effect of independence of Uganda on Kenya rules as to service of process of Kenya courts in Uganda – Replacement of concept of “British subject” by concept of “Kenya citizen” in O. 5, rr. 25 and 26 of Civil Procedure (Revised) Rules 1948 (K.).*

Editor’s Summary

The plaintiff sued the defendant in August, 1965, in the High Court of Kenya, claiming an amount alleged to be due from the defendant on a guarantee given by the defendant to the plaintiff to secure sums due to the plaintiff from a third party. The defendant was described in the plaint as a limited liability company incorporated in Uganda and the address given for the defendant was in Jinja, Uganda. In September, 1965, the plaintiff obtained an order *ex parte* for leave to serve the summons in the suit upon the defendant at Jinja. The summons was served on the defendant at Jinja; and the defendant entered an appearance in the suit in November, 1965. In February, 1966, however, an order was made by consent setting aside the *ex parte* order of September, 1965. Then in March, 1966, the plaintiff obtained a fresh order *ex parte*, this time granting leave for service of the summons to be effected upon the defendant through the Uganda district court at Jinja. An affidavit by a process-server of the Uganda district court verifying that service had been made on and accepted by the defendant at Jinja was filed in the Kenya court in June, 1966; and later in that month the

defendant entered an unconditional appearance through an advocate. The plaintiff, on July 13, 1966, filed a motion for summary judgment which was served on and accepted by the defendant's advocate. The next day the defendant filed notice of the present motion, for hearing (at the choice of the defendant's advocate) on October 24, 1966. Before this motion could come on, however, the plaintiff's application for summary judgment was heard and granted in September, 1966; and a decree was issued and sent to Jinja for execution on the defendant. The defendant's present motion sought an order setting aside the service of the summons on the defendant by the court in Uganda (not the setting aside of the original order for service) on the ground, *inter alia*, that notice of the summons under O. 5, r. 26 of the Civil Procedure (Revised) Rules 1948 and not the summons itself under r. 25 of that Order, should have been served and that service of the summons was void and a nullity. The defendant in the alternative asked for an order enlarging the time for it to file its defence.

Held –

- (a) even if its order for service out of the jurisdiction had been wrongly made, the Kenya court had no power to set aside the service effected in Uganda by the Uganda court (*Hewitson v. Fabré* (1) and *Fry v. Moore* (2) distinguished);
- (b) rule 25 of O. 5 of the Civil Procedure (Revised) Rules 1948, continues to apply to service of Kenya summonses in Uganda, so that service of the summons was regular (decision of Harris, J. in *Leslie and Anderson's* case (3) followed);
- (c) (i) even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity (*Fry v. Moore* (2) adopted, test in *Marsh v. Marsh* (7) applied);
(ii) any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing;
- (d) the defendant's alternative application for an extension of time for filing its defence was misconceived, because a decree had already been issued; and should be refused in any event on the merits.

Application dismissed with costs.

Cases referred to in judgment:

- (1) *Hewitson v. Fabré*, (1888), 21 Q.B.D. 6.
- (2) *Fry v. Moore* (1889), 23 Q.B.D. 395.
- (3) *Leslie and Anderson (Coffee), Ltd. v. Hoima Ginners, Ltd.*, [1967] E.A. 44.
- (4) *Gohoho v. Guinea Press, Ltd.*, [1963] 1 Q.B. 948.
- (5) *Re Pritchard (deceased)*, [1963] 1 Ch. 502.
- (6) *Jethalal Oil Mills and Soap Factory, Ltd. v. Colonial Oil Mills, Ltd.* (Mombasa High Court Civil Case No. 22 of 1956) (unreported).
- (7) *Marsh v. Marsh*, [1945] A.C. 271.
- (8) *Anlaby v. Praetorius* (1888), 20 Q.B.D. 764.

(9) *Smurthwaite v. Hannay*, (1894] A.C. 494.

Judgment

Harris J: This is a motion by the defendant seeking an order that the service upon it of the summons to appear in these proceedings be set aside or, alternatively, that the time within which the defendant may file its defence in the suit be enlarged by extension to a date thirty days from the date of the order to be made on the motion.

In the action the plaintiff claims a sum of £50,000 from the defendant on a guarantee stated to have been given by the latter to the plaintiff to secure the

payment of sums due by a third company. In the plaint, which was filed on August 11, 1965 at Mombasa, the defendant is described as a limited liability company incorporated in Uganda whose address is 25, Main Street, P.O. Box 196, Jinja, Uganda. By order dated September 24, 1965 made *ex parte* the plaintiff obtained leave to serve the summons in question upon the defendant at Jinja. This was done and an appearance was entered on November 16, 1965, but on February 8, 1966 an order was made by consent setting aside the order of September 24 and on March 21, 1966 a fresh order was made *ex parte* granting leave for service of the summons upon the defendant at Jinja to be effected through the district court at Jinja. On June 20, 1966 there was filed an affidavit by a process-server of the district court of Busoga at Jinja deposing to the fact that on June 9, 1966 the deponent, having received the relevant summons issued by this Court at Mombasa, served it on the defendant at Jinja, the service being accepted by the defendant and copies of the summons retained by it. The defendant, acting through its advocate, Mr. C. B. Gor, entered an unconditional appearance in the suit at Mombasa on June 30, 1966.

It is necessary at this point to set out certain further matters. On July 13, 1966 the plaintiff issued a notice of motion for hearing on August 31, supported by an affidavit sworn on July 12 and filed on the following day, seeking judgment under O. 35, rr. 2 and 3 of the Civil Procedure (Revised) Rules 1948. This notice and the supporting affidavit were served on and accepted by the defendant's advocate on July 16. Meanwhile, on July 14, the defendant filed the notice of the present motion, supported by an affidavit of its advocate sworn on July 12 and filed on July 14. The date for hearing shewn in this notice of motion was October 24, 1966, a note on the court file indicating that this date was the choice of Mr. Gor. On July 28, 1966, the case was mentioned in court at Mombasa before Wicks, J. at the monthly call-over when Mr. Cleasby appeared for the plaintiff and Mr. Gor for the defendant, and the date August 31 was confirmed for the hearing of the plaintiff's motion for judgment.

On August 31, 1966, the plaintiff's motion came on for hearing before me at Mombasa, Mr. Cleasby appearing for the plaintiff and there being no appearance for the defendant. It was apparent from the affidavit in support of the motion that the application should succeed but fearing that the absence of a representative for the defendant might have been due to sudden illness or to an oversight or some similar cause I reserved my decision for two weeks in order to afford the defendant, in view of the substantial sum of money involved, an opportunity in the interval to apply to be heard or to seek to have any order that might be made expressed to be without prejudice to its motion now before me and of which notice had been filed on July 14. No application in that behalf was made by the defendant and on September 16, 1966 I gave judgment for the plaintiff in the terms of its notice of motion. The advocate for the defendant declined to approve of the draft decree and this was settled before me on January 18 of this year in the presence of Mr. Cleasby and upon notice to Mr. Gor, who did not appear. The costs were taxed by one of the taxing officers of the Court on March 23, 1967 and by an order dated May 4, 1967 the decree was sent for execution to the Jinja district registry of the High Court of Uganda.

Turning now to the present application, the first item of relief sought is an order setting aside the service of the summons on the defendant by the court in Uganda. A short answer to this claim (though one that was not put forward by the respondent) would seem to be that even if this Court, as is contended, in making the order of March 21 granting leave for service of the summons through the district court of Jinja, had exceeded its jurisdiction, the court at Jinja nevertheless caused its process server to effect service of the summons upon the defendant, which service the latter accepted, and this court has no power to challenge the validity of an act done by an officer of the court at Jinja, even if it could be

shewn that either that court or its officer had acted under a mistaken impression as to the effectiveness of the order of March 21, 1966. Furthermore, although the individual upon whom service was effected was not described in the affidavit of service as being the secretary or other officer of the defendant or as being its authorized agent, nevertheless the defendant has at no time sought to deny his authority to accept service on its behalf, and by entering an appearance in this Court to the summons so served upon and accepted by that individual the defendant, in my opinion, would be estopped from now seeking (if it were to do so) to deny his authority.

Had the present application been for the setting aside of the order of this Court made *ex parte* on March 21, 1966, different considerations would have applied for there can be no doubt as to the jurisdiction of the court in a proper case to set aside its own order, but the defendant has not shewn that any court in this country has power to set aside the service of a document in Uganda effected by a court in Uganda. In the English case of *Hewitson v. Fabré* (1888), 21 Q.B.D. 6, upon which the defendant relies, the relief sought and granted was to set aside, not the service of the writ in France, but a judgment obtained in England in default of appearance, and in *Fry v. Moore* (1889), 23 Q.B.D. 395, although the motion was to set aside the service of a writ effected in Canada and all subsequent proceedings, the court treated the application as being one for setting aside merely the writ itself, which has been issued in England, and an order made in England for substituted service. The present application was amended by leave at the hearing and although, notwithstanding the very considerable delay on the part of the defendant in bringing the motion to hearing and the highly technical ground upon which its present application is based, I might have been prepared to allow a further amendment, if sought and (if necessary) upon terms, none was sought and I am not disposed at this stage to treat this application as being other than what it is expressed to be on the face of the notice of motion.

The matter might be allowed to rest there but in view of the careful argument addressed to me by counsel for the defendant I consider that I should deal with the several points raised by him.

It is not denied that the order of this Court of March 21, 1966 was correctly made in exercise of the jurisdiction conferred by O. 5, r. 21 of the Civil Procedure (Revised) Rules 1948, which is specifically referred to on the face of the order and its applicability is not in dispute. The defendant contends, however, that the provisions of r. 26, rather than those of r. 25 of O. 5 apply, with the result that notice of the summons and not the summons itself should have been served and that service of the summons was void and a nullity. These rules read as follows:

- “25. Where leave to serve a summons out of the Colony has been granted under r. 21 and the defendant is a British subject or British protected person or resides in the United Kingdom or in any British dominion, colony, dependency or protectorate or mandated territory out of the Colony, the summons shall be served in such manner as the Court may order.
26. Where the defendant is neither a British subject nor British protected person and is not in British dominions or in any British protectorate or mandated territory, notice of the summons and not the summons itself is to be served upon him.”

The argument of the defendant is, in short, that since its registered office is in Uganda it cannot be said to come within r. 25, while the plaintiff contends that the provisions of r. 25 govern the matter and that the procedure adopted was correct.

The point at issue has already been considered by me in the case of *Leslie and Anderson (Coffee), Ltd. v. Hoima Ginners, Ltd.*, [1967] E.A. 44, upon the decision in which the plaintiff relies, but the defendant, as it is entitled to do, has now challenged the correctness of that decision and invited me to re-consider it. The facts in that case are not materially distinguishable from those in the present and the effect of the decision is that, despite the recent constitutional developments in Uganda, the service in that country of proceedings in this Court is still governed by the provisions of r. 25, rather than rr. 26 and 27, of O. 5.

The question is essentially one of construction of the relevant rules in the light of present-day circumstances. The Rules of 1948 were made before the concept of a state with a purely republican status enjoying membership of the Commonwealth had become more than an idea, and r. 25, when made, embraced in its language every geographical area of whatever constitutional status making up what at one time had been collectively referred to as “the British Empire”, then “the United Kingdom, Dominions and Colonies”, and now “the Commonwealth of Nations”. That entity in 1948 comprised, *inter alia*, as does the Commonwealth today, both Kenya and Uganda, and in my opinion the subsequent adoption by Uganda of a status or form of government which does not specifically fall within the terms used in r. 25 but preserves for her membership of the Commonwealth cannot be said, looking at the clear intendment of the rule, to render its provisions no longer applicable to her and to terminate in relation to Uganda the machinery with which this country in 1948 provided herself, by means of r. 25, for the service of summonses issued by this Court, in proceedings wherein the defendant resides in any one of the countries then falling within the description of “the United Kingdom or any British dominion, colony, dependency or protectorate or mandated territory out of the Colony”.

Mr. Wilkinson, in contending that r. 26 rather than r. 25 governs the present position between the two countries, conceded that unless an order has been made by the Chief Justice applying r. 27 of O. 5 to Uganda (and there is no suggestion that such an order has been made) the provisions of r. 26 cannot operate as between the two countries and that, if he be correct in his submission as to the exclusion of Uganda from the ambit of r. 25, there are now no means whereby either a summons or notice of a summons issued in Kenya can effectively be sent for service in Uganda. If this be the position with respect to Uganda it would seem to follow that it is the position also in regard to Tanzania and to every other member of the Commonwealth that has adopted a republican form of government. In deference to the request of counsel I have re-considered my decision in *Leslie and Anderson's* case but, for the reasons there stated in addition to those which I have set out above, I am still of the opinion that, on its true construction, r. 25 continues to apply to the service of summonses, pursuant to leave granted under r. 21, in Uganda.

If Mr. Wilkinson be correct in contending that r. 25 no longer applies to Uganda and if no order has been made by the Chief Justice applying r. 27 to that country, with the result that the Rules of 1948 now contain no provision for the service in Uganda of proceedings in this country, the Court is nevertheless, in my opinion, empowered, in the exercise of its inherent jurisdiction and the better to attain the ends of justice, to send for service in Uganda, or for that matter in any foreign country, any summons or other document emanating from the Court, leaving it to the authorities in that country to take such action in the matter as they may think fit. I do not consider that the suggested infringement of the sovereignty of the recipient country, upon which the distinction in the Rules between summonses and notices of summonses appears originally to have been based, has much practical bearing in the circumstances of today.

Assuming, however, that the defendant is correct in its contention that the service was defective, the next question to consider is whether the defect has

been waived or negated, for the plaintiff contends in effect that the defendant, both by entering a formal appearance to the summons through its advocate and by its conduct, should be taken to have waived any irregularity that may have attached either to the order for the service of the summons or to the service itself. Here again counsel for the defendant has asked me to re-consider my judgment in *Leslie and Anderson's* case (*supra*), and this I have done in the light of his argument. Briefly his contention is, first, that the service of the summons on the defendant amounted, not merely to an irregularity, but to a nullity which could not be put right by a subsequent waiver, and, secondly, that even if it were merely an irregularity there has been no waiver. In *Hewitson's* case (*supra*) upon which the defendant relies, the service of the writ was held to be a nullity and not merely an irregularity, but nevertheless Wills, J., was not prepared to say that the defect might not have been put right by the defendant appearing, and this view has since been shared in both *Gohoho v. Guinea Press, Ltd.*, [1963] 1 Q.B. 948, and *Re Pritchard (deceased)*, [1963] 1 Ch. 502. The defendant relied also upon the unreported decision in this Court of MacDuff, J., dated August 21, 1956, in *Jethalal Oil Mills and Soap Factory, Ltd. v. Colonial Oil Mills, Ltd.* (High Court Civil Case No. 22 of 1956 (Mombasa)), where an entry of appearance was held not to cure a defect arising from an order for service out of the jurisdiction having been made without due compliance with r. 23 of O. 5. The present case is clearly distinguishable for we are concerned here only with the regularity of the service and not with the validity of the order.

In my opinion, any doubts which may have been created by *Hewitson's* case (*supra*) were dispelled by the decision in the following year of the Court of Appeal in England in *Fry v. Moore* (1889), 23 Q.B.D. 395, which provides a sufficient answer to the defendant's case. There a writ was issued in that country in the general form against a defendant, who at the time was in Canada and therefore not within the jurisdiction of the court, for a cause of action which had arisen within the jurisdiction. Notwithstanding the provisions of the English rules requiring that a writ for service out of the jurisdiction should not be issued without leave of the court no such leave had been obtained, but nevertheless the plaintiff some weeks later obtained an order for substituted service of the writ upon the defendant's brother who was within the jurisdiction and, in default of appearance within due time, the plaintiff on January 12, 1889, caused judgment to be signed. The brother, who was a solicitor and had previously acted for the defendant in other matters but not in these proceedings, thereupon applied to have the judgment set aside and the plaintiff ordered to deliver a statement of claim. Shortly afterwards, on March 2, the defendant, acting through another solicitor personally retained by him, made a similar application. The second application came before a Divisional Court and was refused, and, on the defendant appealing, the Court of Appeal upheld the refusal of the Divisional Court. Lopes, L.J., in his judgment, after stating that the service of the writ was entirely bad, said ((1889), 23 Q.B.D. at p. 399):

"Then comes the question, has the irregularity been waived by the defendant? It is said that the proceeding was a nullity, and no doubt the distinction between a nullity and a mere irregularity in procedure is often a very nice one. But in the present case I think there was only an irregularity. The proceeding – the issue of the writ – was a proper one; the irregularity was only in the mode in which it was attempted to carry it out by service. I think this was a mere irregularity in procedure which could be waived by the defendant. It appears that, before the summons of March 2 was issued, the defendant had retained a solicitor to act for him, and by that summons he asked, not only that the judgment might be set aside but that the plaintiff might be ordered to deliver a statement of claim. This was utterly inconsistent with the theory that, by reason of the non-service of the writ, no

action was in existence. I think it amounts to a waiver of the irregularity, and that the judgment must stand.”

Applying this decision it appears to me that, in the first place, the defect of which the defendant complains in regard to the service of the summons (assuming, that is, that such a defect existed) constitutes, at most, an irregularity capable of being waived, and, secondly, that the irregularity has been waived. As to the first question a helpful criterion enabling one to say into which category any given defect should properly fall is to be found in the opinion of the Judicial Committee of the Privy Council in *Marsh v. Marsh*, [1945] A.C. 271, where, in considering whether an order making absolute a decree nisi of divorce pronounced before the time allowed by the rules for showing cause had elapsed was a nullity, the Board said (*ibid.*, at p. 284):

“But it does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby v. Praetorius* (1888), 20 Q.B.D. 764, and *Smurthwaite v. Hannay*, [1894] A.C. 494, are leading examples of the former, while *Fry v. Moore* (*supra*) may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in *Fry v. Moore* (*supra*), there has been a defect in the service but the writ had come to the knowledge of the defendant.”

Here there is no doubt that the summons, which on its face states that a copy of the plaintiff was annexed to it (a statement that has not been controverted), came to the knowledge of the defendant and that the latter’s subsequent course of conduct was adopted and followed in the light of the information so conveyed to it. Applying therefore the criterion suggested in *Marsh’s* case (*supra*), I think that there can be no doubt that any defect there may have been in the service constituted an irregularity only, capable of being waived.

The next question is as to whether such irregularity (if any) has been waived. In answer to this the plaintiff contends that the conduct of the defendant after service is consistent only with waiver of any such irregularity as may have occurred. The first and most important act by the defendant in this regard, although not specifically referred to by the plaintiff, is its inclusion, as an alternative relief in the present motion, of a prayer for enlargement of the period permitted by the Rules for filing its statement of defence. Such an application cannot properly be brought nor such a pleading filed by a defendant who has not appeared in the suit and it is only by relying upon its appearance to the summons now in question that the defendant could either apply for or take advantage of such relief as the court might see fit to grant in regard to an enlargement of time. In my opinion, adopting the view expressed in *Fry v. Moore* (*supra*), this step on the part of the defendant is alone sufficient to constitute an effective and irrevocable waiver by the defendant of its right to object to any irregularity that may have occurred in the service of that same summons.

A further aspect of the defendant’s conduct in this matter, relied upon by the plaintiff as constituting evidence of waiver, is the very great delay in bringing the present motion to hearing. Notice of the motion, as already mentioned

was filed on July 14, 1966, but, for some reason which has not been explained, the hearing of the motion was fixed at the instance of the defendant for 28th of the following October, that is, more than four and a half months after the date of the service now sought to be impugned. Although no limit of time is prescribed for the bringing to hearing of such a motion it is inherent in the obligations attaching to a party seeking relief of this nature that he should move expeditiously in order to avoid the danger of the court taking steps in the meantime which, if the motion should succeed, might be rendered nugatory or of no purpose. *Vigilantibus, non dormientibus, jura subveniunt*. I have already mentioned that, pursuant to its motion under O. 35, rr. 2 and 3, filed on July 13, 1966, and served on the defendant's advocate three days later, the plaintiff on September 16 of that year obtained an order for judgment for the full amount of its claim, the defendant, despite a fair and reasonable opportunity to do so, taking no steps to request that this application be adjourned until the present motion should have been disposed of or that the order on the plaintiff's motion be expressed to be without prejudice to any order that might be made on the present motion.

Furthermore, the matter does not end there. When the present motion, listed for October 24, 1966, came before Wicks, J., at Mombasa he directed at the request of the defendant that the matter be transferred to me to be heard at Nakuru, where I was then sitting. The matter was accordingly set down by the registry of this Court at Nakuru for hearing before me on January 18, 1967, whereupon the defendant's advocate by letter addressed to the registry immediately caused the matter to be taken out of the list for that day to suit the convenience of its counsel. Nothing further seems to have been heard of the motion until June 26 when an application was received by the registry at Mombasa to have a fresh hearing date fixed, and on August 31, 1967, the hearing was fixed by consent for October 9. It is worthy of note that I myself was available to hear the matter at any time between October, 1966 and the end of August, 1967 and would have been in a position without difficulty and at reasonably short notice to have dealt with the case. Meanwhile, during this long period of inactivity by the defendant, the draft decree on the plaintiff's motion for judgment was settled on January 18, 1967, on notice to the defendant as already mentioned, the plaintiff's bill of costs of the suit was taxed on March 23, 1967, also on notice to the defendant, and on May 4 the decree of this Court was forwarded by the registry to the High Court of Uganda for execution.

In my opinion, apart from any other consideration, the delay on the part of the defendant in bringing its motion to hearing, for which no justification or explanation of any kind has been suggested or offered, is sufficient, in the particular circumstances of this case, to raise a presumption that the objection put forward fifteen months earlier to the service of the summons in June, 1966 had been abandoned and any irregularity attending the same waived.

For these reasons the first order sought by the defendant setting aside the service of the summons upon the defendant must be refused.

I will now deal with the alternative relief claimed, namely, an order enlarging the time allowed by the Rules of the filing by the defendant of its statement of defence.

This portion of the application is misconceived. By its decree of September 16, 1966, granted under the provisions of O. 35, r. 2 on the footing that the defendant had not a good defence on the merits, the issue between the parties was determined and the matter is now *res judicata* subject, of course, to that decree being set aside or varied, as provided by the Rules, and it would be quite incorrect for me at this stage to extend the time for filing a defence so long as that decree stands. Admittedly the decree had not been issued when

notice of the present motion was filed, but I cannot shut my eyes to the fact that, as already mentioned, the defendant did not take advantage of the opportunity to which I have referred to apply either to have the application for judgment heard contemporaneously with the present motion or to have the judgment upon which the decree issued expressly made subject to any order that might be made on the present motion. In the result the judgment has been implemented by the issue of the decree and both remain unchallenged to this day, the costs have been taxed and certified, and the decree sent to Uganda for execution. The relief sought by way of enlargement of time for defence is therefore refused, but without prejudice to such rights as the defendant may possess to seek to have the judgment and decree set aside and thereafter to renew the present application.

Apart from the inability of the Court, for the reason stated, to grant the extension of time sought the defendant has not made out a good case on the merits. The plaintiff's claim is founded upon a contract of guarantee alleged to have been entered into between the parties whereby the defendant guaranteed payment to the plaintiff of moneys due to the latter by a third company, the amount secured not to exceed £50,000, which sum, it is stated, subsequently became due to the plaintiff by the defendant under the said guarantee by reason of the default of the third company and remains unpaid. In an affidavit, made by the advocate at that time acting for the plaintiff and filed on March 15, 1966, in support of the application for leave to serve the summons upon the defendant in Uganda, it is sworn that the said sum of £50,000 is justly due by the defendant to the plaintiff. In a further affidavit made by Mr. Merrett, the manager of the branch of the plaintiff bank at Treasury Square, Mombasa, on July 12, 1966, and filed in support of the application for judgment leading to the decree of September 16, 1966, it is stated that the said sum of £50,000 is payable in Mombasa, that no part of the said monies has been paid and that in the deponent's belief there is no defence to the action. The defendant has at no time sought to deny its indebtedness to the plaintiff in the sum claimed or to challenge the averments to which I have referred but has contented itself with filing on July 14, 1966, an affidavit by its advocate stating that it is incorporated in Uganda, and does not carry on its business or have a residence in Kenya, and that the guarantee in question does not itself state that the sum guaranteed is payable at Mombasa or within the jurisdiction of this Court. These averments, if true, would not of themselves defeat the plaintiff's claim. Furthermore, the affidavit of the advocate for the defendant discloses that as far back as July 12, 1966, he attended at the court registry and perused the record of proceedings in the suit. It is manifest therefore that he had a sight of the affidavit filed by the plaintiff on March 15, 1966, to which I have already referred and to which is annexed a Photostat copy of the guarantee in question. The affidavit of Mr. Merrett had not been filed on July 12 but a copy was formally served on the defendant's advocate on July 16, 1966. Save for the affidavit filed on July 14 the defendant has made no effort to dispute the clear averments in the plaintiff's two affidavits and the Court therefore finds itself in the position of having before it undisputed evidence on oath that in the events which happened the defendant became indebted to the plaintiff in the sum of £50,000, that the moneys have been demanded from the defendant but remain unpaid and that, in the opinion of the plaintiff's former advocate and of Mr. Merrett, this sum is now justly due and owing by the defendant to the plaintiff.

A defendant who, more than twelve months after judgment has been entered against him under the provisions of O. 35, r. 2, appears before this court seeking to have the judgment set aside and leave granted for the filing of a late defence undertakes a burden of some magnitude. Apart from the fact that in the present case the defendant has not sought to have the judgment set aside it is sufficient

to say, with regard to its application for leave to file a defence out of time, that in respect neither of matters of law nor of merits has the defendant, in the opinion of the Court, sufficiently discharged that burden to justify the Court, in the exercise of its discretion, in granting the application.

I may observe that, by reason both of the importance to litigants in general of the questions raised and of the comparatively large sum of money involved, I have given this matter careful consideration. For the reasons which I have endeavoured to express I hold that the defendant's application should be dismissed in its entirety and with costs.

Order accordingly.

For the applicant

PJ Wilkinson, QC, MG Vyas and CB Gor
CB Gor, Mombasa

For the respondent:

Mansur Satchu
Atkinson Cleasby & Satchu, Mombasa

Editor's Summary

Appeal

Against this decision the defendant appealed, and on appeal it was contended that the service of the summons was a nullity because:

- (i) the seal on the summons was the wrong seal, being that of the resident magistrate's court and not of the High Court;
- (ii) it was a summons and not the notice of a summons which had been served upon the defendant;

and that the judgment, although not directly challenged, was a nullity founded upon a null and void service of the summons.

In the alternative, if the service of the summons was not a nullity, it was contended that the irregularities connected with it had not been waived by the defendant and were of such a grave nature that the service should be set aside.

Held –

- (a) insofar as the notice of motion was to set aside the service of the summons (as opposed to setting aside the order of the court for service) the Kenya court had jurisdiction, contrary to the decision of Harris, J., to set aside the service of its own process;
- (b) as to the order of service itself:
 - (i) the placing of an incorrect seal subsequent to the order did not render the order a nullity;
 - (ii) the service of the summons under O. 5, r. 25 was incorrect; and a copy of the summons should have been served under O. 5, r. 26 of the Civil Procedure (Revised) Rules 1948. The distinction between O. 5, r. 25 relating to service on British subjects and O. 5, r. 26 relating to

service on persons who were not British subjects was no longer applicable, and the true distinction was now between service on Kenya citizens (O. 5, r. 25) and persons who were not Kenya citizens (O. 5, r. 26) (overruling, in this respect, *Leslie and Anderson (Coffee), Ltd. v. Hoima Ginners, Ltd.* (1));

- (iii) although a copy of the summons should have been served, the error was not of such a fundamental nature to render the procedure followed a nullity (*Hewitson v. Fabré*(2) explained);
- (c) the entry of an unconditional appearance waived any irregularities in the service, in that the irregularities did not prejudice the defendant in any way (decision of MacDuff, J., in *Jethalal Oil Mills and Soap Factory, Ltd. v. Colonial Oil Mills, Ltd.* (6) overruled);
- (d) an extension of time to file a defence should be refused, particularly since the judgment had not been set aside or challenged on appeal.

Appeal dismissed with costs.

Cases referred to in judgment:

- (1) *Leslie and Anderson (Coffee), Ltd. v. Hoima Ginners, Ltd.*, [1967] E.A. 44.
- (2) *Hewitson v. Fabré* (1888), 21 Q.B. 6.
- (3) *Gohoho v. Guinea Press*, [1962] 3 All E.R. 785.
- (4) *Re Pritchard*, [1963] 1 All E.R. 873.
- (5) *Re Orr Ewing* (1882), 22 Ch.D. 456.
- (6) *Jethalal Oil Mills and Soap Factory, Ltd. v. Colonial Oil Mills, Ltd.* (Kenya High Court Civil Case No. 22 of 1956) (unreported).

July 10, 1968. The following considered judgments were read:

Judgment

Sir Charles Newbold P: This is an appeal against a decision of the High Court of Kenya (Harris, J.) given on motion by a defendant seeking an order that service upon it of a summons be set aside. The High Court dismissed the application and from that decision the applicant, who was the defendant in the suit which gave rise to the application, has appealed to this Court. The relevant facts may be shortly stated as follows:

On August 11, 1965, the plaintiff filed a plaint against the defendant claiming an amount of £50,000 plus interest due under a guarantee. The defendant was described in the plaint as “a limited liability company incorporated in Uganda and whose address is 25, Main Street, P.O. Box 196, Jinja”. On March 15, 1966, a chamber summons was taken out by the plaintiff under O. 5, r. 21, asking for an order that leave be granted to serve the summons in the suit outside the jurisdiction. On March 21, 1966, such leave was granted *ex parte* and the formal order stated that leave was granted for the service of the summons outside the jurisdiction upon the defendant “at 25, Main Street, P.O. Box 196, Jinja, Uganda, through the district court at Jinja, Uganda”. The summons to the defendant was headed “In the High Court of Kenya” and was signed by the Deputy Registrar of the High Court of Kenya at Mombasa, but it was sealed with the seal of a subordinate court, that is, the resident magistrate’s court at Mombasa. This summons was, according to an affidavit of a process server of the district court of Busoga at Jinja, served on the defendant on June 9, 1966, and service was accepted. On June 30, 1966, Mr. Gor, a Kenya advocate, entered an unconditional appearance in the suit in the High Court. On July 13, 1966, the plaintiff filed a notice of motion under O. 35, r. 2, asking for summary judgment to be entered in its favour. This notice of motion was served on and accepted by the defendant’s advocate on July 16. On July 14 the defendant filed a notice of motion for an order “that the service of the summons to appear on the defendant herein be set aside on the ground that the court has no jurisdiction to order service of the summons in Uganda inasmuch as the defendant is a company incorporated and carrying on business in Uganda and not in Kenya”, and seeking in the alternative an extension of thirty days from the date of the decision on the motion in which to file a defence. The date of the hearing shown in this notice of motion was October 24, 1966, and a note on the court file stated that this date was the choice of Mr. Gor, the defendant’s advocate. On August 31, 1966, the plaintiff’s motion asking for summary judgment came on for hearing in the High Court in the absence of the defendant or any advocate representing it. The judge reserved his

decision for two weeks in order, as he stated, to enable the defendant to apply to be heard; but as no application to that effect was made, on September 16, 1966, the judge gave judgment for the plaintiff in terms of its notice of motion. Subsequently, the costs of suit were taxed and the decree consequent upon the judgment was sent for execution to the High Court of Uganda. We were informed by Mr. Wilkinson, who appeared on behalf of the defendant, that there is an order of the High Court of Uganda staying execution of that

decree until the decision of this Court on this appeal. The notice of motion of the defendant seeking an order setting aside the service of the summons came on for hearing before Harris, J., and the application was dismissed with costs on December 2, 1967. From that decision the defendant has appealed to this Court.

The decision of the High Court was challenged on two main grounds. The first ground was that the service of the summons on the defendant was a nullity for two reasons. First, that the summons had been sealed with the wrong seal and, secondly, that it was a summons and not a notice of summons which had been served on the defendant. The argument then continued that if the service was a nullity therefore everything founded upon it, such as the judgment, became equally a nullity, even though the judgment itself was not directly challenged in these proceedings. The second ground was that even if the service of the summons was not a nullity, the irregularities connected with it had not been waived by the defendant and were of such a grave nature that the defendant was entitled to have the service of the summons set aside, with the result that the judgment based upon the service of the summons would cease to have effect, even though the judgment itself was not directly challenged in these proceedings.

Dealing with the first ground, there was considerable uncertainty, both in the argument before us and, I think, before the High Court, as to whether what was sought to be set aside was the order for service of the summons outside Kenya or the service of the summons itself. Harris, J., held that the court had no power to set aside the service of the summons as that had been effected by the courts in Uganda and a Kenya court had no power to challenge the validity of the service. I do not accept this. It is open to a Kenya court to set aside the service of its own process, no matter who effected the service. In my view, however, it does not matter very much whether what is set aside is the order of the court for service of the summons or the service of the summons. As the affixing of the incorrect seal was done subsequent to the order for service and thus cannot be a ground for setting aside the order, I shall deal with the matter on the basis that what is sought to set aside is the service of the summons. The consideration of the position on such a basis accords with the terms of the notice of motion.

It is urged that the service was a nullity because the summons had the seal of the resident magistrate's court on it and not, as it should have had, under O. 5, r. 1 (3) and r. 7, the seal of the High Court. It was undoubtedly incorrect to put on the summons the seal of the resident magistrate's court. The summons itself, however, purports to issue from the High Court and is signed by the Deputy Registrar of the High Court. The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High Court; and it was not until a very late stage that it was noticed that the seal was an incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant. The concept of a seal as a means of authenticating a document dates back into antiquity. In England until the eighteenth century relatively few people were literate. Almost every individual of any position had a seal with a distinctive design, and it was this seal which was affixed to a document so as to declare that he had executed it. This historical means of authenticating a document continued in England long after the basic reason for its existence had ceased and long after individuals had ceased to have and use their own seals. This concept of a means of authentication has been applied in Kenya in wholly different conditions from those which gave rise to the necessity for the concept and, indeed, it is doubtful whether to-day there exists a single individual with his own seal containing a device which he affixes to documents to authenticate the documents as his act. Indeed, the position has become so unreal that what

is in frequent use as a seal is nothing other than a stamp containing words which, of course, can only be understood if the person is literate. In these circumstances I cannot regard the incorrect placing of the seal of one court on a document, instead of the seal of another court, as an act so fundamental that it transforms what would otherwise be an effective document into a complete nullity.

It is also urged that the service of the summons is a nullity because the summons itself, and not the notice of the summons, was served. Order 5, rr. 25 and 26 are as follows:

- “25. Where leave to serve a summons out of the Colony has been granted under r. 21 and the defendant is a British subject or British protected person or resides in the United Kingdom or in any British dominion, colony, dependency or protectorate or mandated territory out of the Colony, the summons shall be served in such manner as the Court may order.
- 26. Where the defendant is neither a British subject nor British protected person and is not in British dominions or in any British protectorate or mandated territory, notice of the summons and not the summons itself is to be served upon him.”

As the defendant is neither a British subject nor a British protected person and as it does not reside in the British dominions or in any British Protectorate or mandated territory, under r. 26 notice of the summons and not the summons itself should have been served on him. Mr. Mackie-Robertson for the plaintiff submits that under the provisions of the Kenya Independence Order-in-Council 1963, s. 4 (1) and the successive similar provisions in the constitutional amendments made subsequent to 1963, the legislation of Kenya, which would include these rules, should be “construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution”. I accept that such is the position, but that leaves still for decision what modifications are necessary. It is urged that in accordance with the decision in *Leslie and Anderson (Coffee), Ltd. v. Hoima Ginnery, Ltd.*, [1967] E.A. 44, the necessary modifications which are to be read into rr. 25 and 26 are the words “or a Commonwealth citizen” and “or a Commonwealth country”, respectively, after the references to the persons and the places in these rules. If this were done then the service of a summons instead of notice of a summons would be the correct procedure as the defendant was a Uganda company and Uganda is a member country of the Commonwealth. I do not accept this submission. These rules related to the period when Kenya was a British colony and protectorate and when the vast majority of the persons therein were either British subjects or British protected persons. The concept, therefore, in these rules was a concept of citizens of Britain and of the dominions of Britain. It is obvious that these rules are inappropriate to the position of an independent Kenya. As many similar provisions exist in other rules I trust that early action will be taken to remedy the position. It is obvious, however, that until that action is taken, the courts, in accordance with the provisions of the Constitution, will have to modify these provisions. It seems to me that the only proper modification is to replace the old concept by the appropriate new concept and to adapt the wording accordingly. The old concept of British subject should obviously be replaced by a concept of Kenya citizen and the old concept of the British Empire should obviously be replaced by a concept of countries over which Kenya exercises sovereign power, if there were any such countries. Doing this, rr. 25 and 26 would read:

- “25. Where leave to serve a summons out of Kenya has been granted under r. 21 and the defendant is a Kenya citizen, the summons shall be served in such manner as a court may order.

26. Where the defendant is not a Kenya citizen and is not in Kenya notice of the summons and not the summons itself is to be served on him.”

If these modifications are made then it is clear that the service of the summons on the defendant instead of a notice was incorrect. I consider that anything to the contrary in the *Leslie and Anderson* case (*supra*) is an incorrect statement of the law. The question then is, did that incorrect action result in the service being a nullity? The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature. To treat the service on a person of the summons itself instead of a notice, to which the summons itself is attached, as of so fundamental a nature that it results in a complete nullity and vitiates everything following would appear to me to be completely unreal unless there is a very good reason for this distinction between the service of the summons and the service of a notice. This requirement for the service of a notice to which the summons is attached instead of the summons itself originated in England about the middle of the last century and stems from the fact that under the English procedure the writ was a command from the Sovereign. It was considered that it would be more courteous, where the writ was to be served on a person who was neither a British subject liable to that command nor a person resident in a country in which the command could be enforced, that notice of the command should be served and not the command itself. So far as I am aware the judicial process of other countries does not take the same form. Certainly nothing in this summons is couched in terms which, if it were served on a non-Kenya citizen outside Kenya, suggests that Kenya is exercising sovereign power outside of its boundaries. It is to be noted that the reason for this distinction does not in any way relate to the parties concerned. It would seem therefore that there is nothing in this mistaken service of the summons instead of the notice of summons as could or should be regarded of so fundamental a nature as to result in a nullity. This is all the more so when the two States involved are two partner States in the East African Community and share a common final Court of Appeal. It is urged that the case of *Hewitson v. Fabré* (1888), 21 Q.B. 6, is an authority for stating that the act of serving a writ, instead of the notice of the writ, outside England was a nullity and not a mere irregularity. Certainly the headnote so states and the case is so treated in the text books. I doubt, however, whether such was the decision of the court. The court consisted of two judges. I think the words of Field, J., are such as can only be consistent with the view that this incorrect service of the writ was a nullity. In the case of *Wills*, J., however, he used these words:

“I do not say what might have happened if the defendant had appeared to the writ; he might in such a case have been estopped, as by so doing he would have induced the plaintiff to go on with the action; but I am disposed to say that unless he has done something of that kind the defendant may come at any time and ask to have the writ set aside.”

These words are not consistent with the act being a nullity but are consistent only with the act being a mere irregularity which irregularity could be waived by the defendant. I might mention that the authority of this case has been doubted in the English Court of Appeal in *Gohoho v. Guinea Press*, [1962] 3 All E.R. 785; and *Re Pritchard*, [1963] 1 All E.R. 873. In this respect I agree with all that was said by Harris, J., in the *Leslie and Anderson* case (*supra*). Even if the decision in *Hewitson's* case is to the effect that the service of the writ instead of the notice of writ results in a nullity, in my view the decision is wrong and should not be followed in East Africa. For these reasons I do not consider that the service of this summons was a nullity.

Turning to the next main ground of appeal, it is urged that even if what occurred was an irregularity the defendant had not waived it by entering an unconditional appearance and, accordingly, that the service should now be set aside, with the result, as seems to be implied in the submission, that the judgment founded on it would become inoperative. Where a defendant enters an unconditional appearance to an action it has always been regarded as an act which waives any irregularity. (See *Re Orr Ewing* (1882), 22 Ch.D. 456 at p. 463, and the *Leslie and Anderson* case (*supra*). It is urged, however, that these decisions should not be followed because there is no provision in the rules for an unconditional appearance and also because MacDuff, J., in *Jethalal Oil Mills and Soap Factory, Ltd. v. Colonial Oil Mills, Ltd.*, Civil Case No. 22 of 1956 (un-reported) held that an unconditional appearance did not waive an irregularity. It is true that there is no specific provision in the rules for a conditional appearance, but to the knowledge of members of the Court it has been the practice, for at least the last twenty-odd years, where appropriate to enter a conditional appearance; and Mr. Mackie-Robertson has stated from the Bar that he has himself done so in certain cases. In my view, where a defendant chooses to enter an unconditional appearance in proceedings in the court, he must be taken, save in exceptional circumstances such as where he contemporaneously files a notice of motion to set aside the proceedings to which he has entered an appearance, to have waived any irregularity in the process to which he enters an appearance and thus accepts the jurisdiction of the court. Any statement to the contrary by MacDuff, J., in the *Jethalal* case (*supra*) is an incorrect statement of the law and should not be followed. The circumstances of this case, in any event, show no ground for treating the irregularities which occurred as entitling the defendant to set aside the service. If a defendant objects to any process on the ground of an irregularity, it is his duty to take immediate action to have it set aside. In this case the defendant, having entered an unconditional appearance, took out the motion which is the subject of this appeal; but in spite of being aware that there was other process designed to obtain for the plaintiff summary judgment on the summons to which an unconditional appearance had been entered, the defendant not only took no part in that process but set down this notice of motion for a date long after the other process would have been heard and determined. Action of that nature on the part of the defendant results in a position in which he can expect very little sympathy from the courts. I consider that the defendant has, by entering an unconditional appearance, waived his right to object to the two irregularities to which I have referred. I also consider that inasmuch as these two irregularities have clearly not prejudiced the defendant in any way he has not shown good reason why the service of the summons should be set aside on the ground of these irregularities and, accordingly, I would not set it aside.

The defendant asks in the alternative that the time for entering a defence be extended. As I have already said, in other proceedings which are not before this Court judgment was entered for the plaintiff and that judgment has not been challenged on appeal. To make an order extending the time in which a defence could be entered would not, it seems to me, be possible without also setting aside the judgment. That judgment, I have held, was regularly obtained and is not the subject of challenge in these proceedings. It would, in my view, not be possible at this stage for this Court to make an order extending the time for entering a defence.

For these reasons I would dismiss the appeal with costs and I would give a certificate for two advocates. As the other members of the Court agree it is so ordered.

Sir Clement De Lestang V-P: I agree.

Law JA: I agree in every respect with the judgment prepared by Sir Charles Newbold, P., and I concur with the order proposed by him.

Appeal dismissed.

For the appellant:

PJ Wilkinson, QC, MG Vyas and CB Gor
CB Gor, Mombasa

For the respondent:

JA Mackie-Robertson, QC and M Satchu
Atkinson, Cleasby & Satchu, Mombasa

Khimji and others v Bakari and others
[1968] 1 EA 685 (HCK)

Division:	High Court of Kenya at Nairobi
Date of judgment:	30 July 1965
Case Number:	26/1965 (125/68)
Before:	Harris J
Sourced by:	LawAfrica

[1] *Civil Practice and Procedure – Agreement – Issues submitted for determination of Court – Formal written agreement necessary – Civil Procedure (Revised) Rules 1948, O. 14, rr. 6 and 7 (K.).*

[2] *Damages – Loss of expectation of life – Usual award is Shs. 8,000/-.*

[3] *Fatal Accident – Damages – Assessment – Hindu joint family – Deceased son managing family business – Whether dependencies of parents to be considered separately – What deductions should be made.*

Editor's Summary

In this fatal accident case the dependants admitted liability for the death of the deceased. The parties produced an agreed statement of issues on damages for the decision of the Court, under O. 14, r. 6 of the Civil Procedure (Revised) Rules 1948; but they did not sign a formal agreement under r. 7. On the question of damages the evidence was that the deceased was twenty-four, unmarried, in good health and lived in his parent's household. He worked in his father's business and was being credited with a monthly wage of Shs. 1,000/-. This wage was not paid to the deceased in cash but was put back into the business. His father, who was sixty, had taken him into the business to get experience with a view to taking it over eventually. For two years before the deceased's death he had been in fact managing the

business. Since his death the business had not prospered and another son of the family had had to be brought in to assist in it. At the time of his death there was no immediate prospect of the deceased marrying or leaving the household. The deceased's estate was valued at Shs. 24,500/-. The deceased's only dependants were his parents.

Held –

- (a) parties who wish to submit issues for decision by the Court under O. 14, r. 6 of the Civil Procedure (Revised) Rules 1948 should enter into a formal written agreement;
- (b) (i) the deceased's expectation of life was forty years;
- (ii) Shs. 8,000/- should be awarded to the estate of the deceased as damages for loss of expectation of life;
- (iii) the dependency of each parent should be ascertained separately (*Kassam v. Kampala Aerated Water Co., Ltd.* (4) considered);
- (iv) Nothing should be allowed by way of increase of damages in respect of the savings made by the deceased;
- (v) the degree of dependency of the father should be reduced by twenty-five per cent, because there were other sons in the family;

- (vi) the cessation of the deceased's drawings from the business should not be taken into account (*Patel v. Hayes* (7) applied);
- (vii) after making the appropriate deductions the correct figure to be awarded was Shs. 27,000/- under the Fatal Accidents Act to the parents.

Judgment for the third plaintiff as administrator against the defendants jointly and severally for Shs. 35,700/- with interest and costs (to be reduced by one-fourth).

Cases referred to in judgment:

- (1) *C. V. Naik v. Nasib Singh Anjla and Another* (Tanganyika High Court Civil Case No. 183 of 1961) (unreported).
- (2) *Davies v. Powell Duffryn Associated Collieries, Ltd.*, [1942] A.C. 601.
- (3) *Kampala Aerated Water Co., Ltd. v. Kassam*, [1961] E.A. 291.
- (4) *Kassam v. Kampala Aerated Water Co., Ltd.*, [1965] E.A. 587.
- (5) *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601.
- (6) *Hayes v. Patel* (Kenya Supreme Court Civil Case No. 173 of 1956) (unreported).
- (7) *C. J. Patel v. Hayes*, [1957] E.A. 748.
- (8) *Daniels v. Jones*, [1961] 1 W.L.R. 1103.

Judgment

Harris J: This is an action for damages brought under the Law Reform Act and the Fatal Accidents Act (chapters 26 and 32 respectively of the Laws of Kenya), arising out of the death of one Jayantilal Lakhamshi, as a result of a motor-car accident which occurred on the Nairobi-Mombasa road on July 20, 1963. The defendants admit that they are responsible for the death of the deceased and the parties have agreed that the issues which arise for determination are:

- (i) what sum, if any, is due from the defendants to the plaintiffs in respect of loss of expectation of life of the deceased; and
- (ii) after taking into account any sum to be awarded under (i) what sum, if any, is due from the defendants to the plaintiffs as damages under the Fatal Accidents Act?

These issues were reduced to writing and submitted by the parties jointly for the determination of the Court in purported pursuance of O. 14, r. 6, of the Civil Procedure (Revised) Rules 1948. Rule 6 provides that where the parties to a suit are agreed as to the question of fact or of law to be decided between them they may state the question in form of an issue and enter into an agreement in writing as mentioned in the rule which will have the effect of implementing the finding of the Court upon such issue. Rule 7 provides that where the Court is satisfied, after making such inquiry as it deems proper, that *inter alia* the agreement was duly executed by the parties it shall proceed to record and try the issue and state its finding thereon. These rules are in identical terms with the corresponding rules of O. 14 of the Indian Civil Procedure Code, from which no doubt they are taken, but the Indian Code sets out in an appendix the form of the agreement into which the parties are required to enter, making it clear that the rules are

intended to mean what in fact they say, namely, that the parties, in addition to stating the issue, must enter into and sign a formal agreement to take appropriate action following the Court's decision. I refer to this matter because on the opening of the case I enquired, as by r. 7 I am bound to do, as to whether the required agreement had been prepared and executed, and was informed by counsel for each side that they felt that the agreement was implicit in the statement of the issues and that, since that statement had been

signed by the advocates for the respective parties, the provisions of the rules had been sufficiently complied with. Not without some doubt in my mind I allowed the hearing to continue but as I subsequently had an opportunity to consider the provisions of the Indian Code and was satisfied that this statement does not in itself comprise the required agreement, I caused the case to be mentioned in Chambers when I informed the respective counsel that in my opinion a formal agreement was necessary, and this document, signed by the respective advocates, has now been filed.

At the hearing evidence was given by the deceased's father and no other witness was called for either side. From this evidence it appeared that the deceased at the time of his death was within a few days of his twenty-fourth birthday and unmarried, had always enjoyed good health and was living with his parents in Nairobi, the household including also a married brother and the latter's wife, an unmarried brother, and two sisters. The deceased had left school in the year 1957, having reached form 3, and continued his studies for some time until, in 1958, he took up employment in the municipal market in Nairobi. In 1959 he worked for a short time in the provision department of a trading firm close to the market and then in a vegetable shop, and in 1960 he commenced working with his father in the latter's business as a merchant dealing in empty bags and tins. His wages in 1958 amounted to Shs. 350/- per month, in 1959 to Shs. 450/- per month, and in 1960, upon joining his father, he was credited with a monthly wage of Shs. 400/-, which was increased in 1962 to Shs. 1,000/- per month and so remained to the date of his death.

It further appeared that during the years 1958 and 1959 the deceased had contributed out of his wages to the expense of running the household but that this had ceased when he took up work in his father's business in 1960, from which time onwards his earnings had not been paid to him in cash but had been credited to him and ploughed back into the business, and the deceased had made no direct contributions thereout to the expenses of the household, which amounted to about £1,200 a year. The father's evidence, which I accept, was to the effect that, being then about sixty years of age, he took the deceased into the business with the twofold object of enabling him to obtain experience of the trade and, in his turn, to assist in the running of the business with a view to his ultimately taking it over. He said that for the last two years of his life the deceased had in fact been managing the business, the father doing little more than keeping an eye on things, and that the deceased had suggested that the latter might retire. The father said that he and his wife, who is now aged fifty-one years, had expected the deceased to support them in their old age, and there is no reason to suppose that, had the necessity arisen, the deceased, assisted probably by the other children, would not have supported his parents so far as he could. Having regard to his age and state of health at the time of his death I would conclude that the deceased had an expectation of life of not less than forty years and that accordingly he might have been expected long to outlive his parents.

No figures were produced to indicate the effect on the business of the death of the deceased but the father stated that it now has to be run by him with the assistance of the youngest son who has had to interrupt or abandon his academic studies to enable him to do so, and that the business is not prospering. The father also thought that, at the time of his death, there was little immediate danger of the deceased getting married or leaving the household but agreed that, if he did marry, his wife and their children, if any, would have to be supported out of the business.

In these circumstances it is necessary to consider both the legal position and the factual probabilities of the situation existing at the date of the death. The assets of the deceased at death were sworn at Shs. 24,500/-, which presumably

represents principally his interest in the business into which his monthly remuneration during the years from 1960 to 1963 had been sunk, but which I understood did not include any sum on account of the claim made in this present suit for shortened expectation of life. If, then, the deceased had at any time decided to discontinue his association with the business, possibly in order to leave Kenya or to set up in trade on his own, he would *prima facie* have been entitled to withdraw both a substantial sum and his own services with perhaps severe consequences to the business. On the other hand, he may well have felt that, since the business would probably, in any event, have passed to him on his father's death, if not sooner, his better prospects lay in maintaining it and, with it, his parents so far as they needed assistance. In this connection I should say at once that the picture to be drawn from the father's evidence was that of a united family in which one would expect to find the children, and particularly the son upon whom the family business was devolving, very ready to maintain the parents during old age. What, then, is the measure of the loss resulting from the death of the deceased, and by whom has the loss been borne?

The first head of damage to be considered is the claim for loss of expectation of life. Bearing in mind such of the matters set out above as are relevant, including the age of the deceased, his state of health at the time of the accident and his station in life, I can see no reason for departing from what has now come to be a generally accepted award of Shs. 8,000/-. Under the provisions of the Law Reform Act this claim enures for the benefit of the estate of the deceased and not for that of his dependants as such, and there will accordingly be judgment for that amount in favour of the father as administrator. The defendants have paid an equivalent sum into Court in full settlement of this claim and I will reserve for later consideration in this judgment the form of order to be made and the matter of costs.

The second head of claim is for the sum of Shs. 200/- as funeral expenses paid by the father presumably as administrator. This claim was not disputed and must be allowed.

We now come to the more difficult question as to the damages to be awarded under the Fatal Accidents Act. The only relevant judicial decision which the researches of counsel were able to produce was an unreported judgment of Mosdell, J., sitting in the High Court of Tanganyika in *C. V. Naik v. Nasib Singh Anjla and Another* (Civil Case No. 183 of 1961: August 22, 1962) which was a claim on behalf of the father, mother and brother of the deceased, all members of a "joint Hindu family", brought under the Law Reform (Fatal Accident and Miscellaneous Provisions) Ordinance (Cap. 360 of Tanganyika), the deceased having been killed in a collision between two motor cars caused by the negligence of the respective drivers, and the claimants being his dependants under the Ordinance. Apart from the fact that in each case the responsibility for the death of the deceased was shared by the drivers of both vehicles concerned, the relevance of that decision to the present case is somewhat limited by the fact that, not only were the family circumstances different, but also the "dependants" under that Ordinance include a wider class than under the Fatal Accidents Act of Kenya. Therefore, although in a letter written in the present case by the advocates for the plaintiffs to the advocates for the defendants it is stated that the deceased was supporting both his younger brother and his two sisters, for the purpose of the present case neither the brothers nor sisters of the deceased can be included among his "dependants", and no exception to this can be allowed by reason of the fact that, as a direct result of the death of their brother, the remaining children of the parents will almost certainly find that the extent of their moral obligation to provide for their parents has been enhanced.

The dependants in this case are the parents alone, and what has to be ascertained is the aggregate amount representing the measure of individual pecuniary

loss to each of them caused by the negligence of the defendants resulting in the death of their son so that that amount when ascertained shall be proportioned to the injury resulting from such death to the parents respectively as the dependants for whom and for whose benefit the action has been brought: see *Davies v. Powell Duffryn Associated Collieries., Ltd.*, [1942] A.C. 601, at pp. 606, 612 and 618.

I shall first consider whether the dependency of each parent should be ascertained separately instead of by estimating the total dependency and apportioning it. This matter was dealt with by the Court of Appeal in *Kampala Aerated Water Co., Ltd. v. Kassam*, [1961] E.A. 291, in which the Court, applying *Davies'* case (*supra*), held (at p. 297) that, since what must eventually be ascertained is the pecuniary loss of each individual dependant, there is nothing to prevent a court from approaching the cases of the various dependants individually if to do so is more convenient than approaching them en bloc. Although the sum awarded in that case has now been varied by the Privy Council on appeal (see [1965] E.A. 587 sub nom. *Kassam v. Kampala Aerated Water Co., Ltd.*) the view of the Court as to the principle of approaching the case of dependants individually rather than collectively was in no way disapproved except where it was likely to produce a manifestly unreasonable result.

In the present case the quality of the dependency of the deceased's father was very different from that of his mother. In the first place the burden of responsibility for maintaining the family household as it was at the date of the death rested primarily upon the father and the degree of dependency of the latter upon the deceased was directly related to the extent to which he depended upon the deceased as his mainstay in the running of the business. At this time the mother would probably have felt herself dependent upon both of them, perhaps more upon her husband than upon the son. On the other hand, the mother is some fourteen years younger than her husband and, even disregarding the fact (of which there was no evidence) that women are sometimes said to have a longer life-span than men, there would appear to be a reasonable probability that she may survive her husband by a corresponding length of time. Again, if the husband had died during the lifetime of the son her dependency would immediately have been transferred, subject to such support as might have been available to her from her husband's estate, to the deceased and, to a lesser extent, each of the other children. In short, the dependency upon the deceased to which this action relates falls to be computed, in the case of the father, as from the death of the son and continuing for the remainder of the father's lifetime and, in the case of the mother, as from the death of the father (assuming that she is then living) and continuing for the remainder of her lifetime. In the particular circumstances of this case I do not feel that the possibility of her re-marriage need be considered. The position, therefore, is, in a sense, the converse of that arising in the case of a husband being killed, leaving a widow and children, inasmuch as, instead of commencing simultaneously, the periods of dependency here are consecutive. For these reasons, I propose to consider the position of each parent separately.

The situation of the father, as disclosed by the evidence, is this. His hopes of continuing in the state of semi-retirement which he has enjoyed since some time in 1962 have, for the present, been dissipated, though not, perhaps, with any immediate financial loss. No evidence was given as to the remuneration being paid to the younger son who is now assisting in the business and it is unlikely that he is receiving as much as the deceased. Furthermore, by the death of the deceased the household expenses of the father may be assumed to have decreased. At the date of the death the father was aged about sixty-three years with perhaps an expectancy of life of some ten years, and it was not suggested that he had any independent source of income apart from the business. The household expenses

of the eight persons then constituting the family was stated to be £1,200 per annum or £150 per head. Allowing this same figure for the parents, that is, £300 per annum for both, we have the approximate cost of maintaining them in their old age as from such time as the father is unable usefully to contribute to the running of the business and must retire, when the deceased might have been expected to take on the burden, assisted possibly by one or more of his brothers or sisters, until the death of the first parent, most probably the father. That time of retirement, however, has not yet arrived and it has not been proved that any financial loss has been suffered to date, but assuming that the father were to retire in perhaps a year from now when he will be sixty-six years of age and that his expectation of life thereafter were to be seven years, the loss primarily attributable to the death of the son, computed at the figure of £300 per annum, would amount to £2,100. In my opinion this figure is not unreasonable as a basis of calculation, to be increased or decreased by the necessary additions or deductions, although I am well aware that it is, as any alternative figure must also be, to some extent an arbitrary result of the consideration of a number of factors as to which there was not and could not have been any conclusive evidence, some of the factors being in themselves imponderables dependent upon contingencies incapable of being accurately evaluated.

In regard to possible additions to this figure, in some of the cases to be found in the reports, notably *Nance v. British Columbia Electric Railway Co.*, [1951] A.C. 601, consideration was given to the contention that where a deceased had, during the years immediately before his death, effected savings out of his income, a possibility arose that, but for his death, he would have continued to save and that the fruits of his economy would ultimately have been reaped by his dependents, so that this factor should be reflected in the amount of damages to be awarded under the Fatal Accidents Act. Although, in the present case, the deceased had apparently ploughed back into the business the entire of his earnings during his last three or four years, which thereupon presumably became portion of its working capital, I am not satisfied that this process could have long continued without reaching the limit of the amount of capital that the little business could absorb. Furthermore, although it was stated that the deceased had given no indication of a desire to get married, no evidence was tendered to suggest any reason why he should not get married and in my opinion, had this eventuality occurred, the probability is that the deceased's savings would have passed on his death to his wife and children, if any, rather than to his parents. I therefore allow nothing by way of increase of damages in respect of this factor.

As to deductions, the first matter to be considered is the fact that at the date of his death the deceased had two brothers and two sisters, all living with their parents. Although, by reason of his being the son who was expecting to take over the business, the deceased was looked upon by his parents as being their main support, it would be incorrect to disregard in toto the position of the other two sons, the younger of whom, as events have now turned out, is taking the deceased's place in the business. The relevance of this factor is that if by some mischance the younger son were also during the lifetime of his parents to meet with a fatal accident, giving rise to a further claim by them under the Fatal Accidents Act, it could not be said that there was no degree of dependency by them upon him or that the award to be made in this present action constituted a bar to the making of an award in the second action. This same possibility could be repeated in the case of the third son with a similar result. In my opinion, therefore, the fact that the father, at the date of the death of the deceased, had these two other sons potentially available, at least to some extent, to step into the place of their brother cannot be overlooked in determining the degree to which the parents were dependent upon the deceased for support and to this

extent the case is different from what it would have been had the deceased been an only son. No authority was cited as to this matter, but, giving it the best consideration that I can, I hold that the degree of dependency of the father upon the deceased at the date of death should on this account be reduced by twenty-five per cent.

Although the circumstances of this case are clearly distinguishable from those dealt with by O'Connor, C.J. in his valuable but unreported decision in *Hayes v. Patel* (Supreme Court Civil Case No. 173 of 1956), which was upheld on appeal by the Court of Appeal for Eastern Africa (reported sub nom. *C. J. Patel v. Hayes*, [1957] E.A. 748), it will be remembered that, in that case, it was held that no account should be taken of the adventitious benefit accruing to the widow by reason of the fact that, as a result of the death of the deceased, she had found employment in a company in which he had been the only substantial shareholder. Similarly in the present case I do not propose at this stage to take into account the fact that the drawings by the father out of the business may have been increased since the death of his son consequent upon the termination of the latter's salary and the return of the father to the management of the business. This element, if and so far as it should be regarded at all, will, in my opinion, be adequately provided for in making the statutory reduction attributable to the receipt by the father as his sole next-of-kin of the entire of the deceased's property including his interest, if any, in the business.

Similarly, I make no deduction at this stage for the possibility of the mother predeceasing the father, in which event, had the deceased lived, any allowance made by him to his father might on that account have been reduced. This possibility can be more suitably dealt with when determining the degree of dependency of the mother.

Summarizing the foregoing, the position with respect to the father is that, starting with the figure £2,100, that is, Shs. 42,000/-, there will be no addition to that sum in respect of any possible savings by the deceased but there will be a reduction by twenty-five per cent, in respect of the dependency of the father on the remaining children. There will be no reduction from the above sum in respect of the economy (if any) effected in the business by the employment of the youngest son in place of the deceased or of the possibility of the mother predeceasing the father, and we are left with the figure Shs. 31,500/-.

It is well settled that where a dependant has directly benefited from the death of the deceased allowance must be made for this benefit, and this allowance, in the present case, will include the award of Shs. 8,000/- under the Law Reform Act. To what extent, however, should it comprise the sum of Shs. 24,500/- representing the value of the deceased's assets at the date of death (apart from his claim under the Law Reform Act)? No doubt the whole of that sum passed to the administrator in trust for the father (in fact, the same person) by reason of the son's intestacy and the defendants contend that it should be allowed in full by way of set off, but it must be remembered that immediately prior to the death the father already had a measure of expectancy in the estate of the deceased by reason of the fact of being his father and nearest of kin and of the son's intestacy. In *Daniels v. Jones*, [1961] 1 W.L.R. 1103, an allowance of 12 1/2 per cent. in the case of a widow's expectancy in her husband's estate, though not disturbed, was regarded by the Court of Appeal in England as being too low a figure. In the circumstances of the present case and bearing in mind the relative ages of the father and the deceased I think that an allowance of five per cent. is fair and accordingly the extent to which the father must give credit for the said sum of Shs. 24,500/-, will be reduced by that figure to Shs. 23,275/-, which I will treat as Shs. 23,000/-.

This sum of Shs. 23,000/-, together with the said sum of Shs. 8,000/-, must be set off against the sum of Shs. 31,500/-, leaving a net sum of Shs. 500/- which

I find to be the sum payable in respect of the father's dependency upon the deceased.

Turning now to the case of the mother, we have seen that she would probably not have required the direct support of the deceased until the death of her husband, which I have assumed will not occur for some ten years after the date of the accident. Calculating the annual sum required for her support on the basis of the figures already given and making no allowance at this stage for the almost certain rise in the cost of living over the period, would produce the sum of £150 per annum as from the death of the husband in eight years from the present time and continuing for the remaining fourteen years of her lifetime. It appears to me to be most unlikely that the father will be able to make any independent provision for the mother and that, but for the death, she would have been maintained primarily by the deceased. Accordingly, this figure of £150 will form the basis of calculation.

There are no additions to be made but certain deductions are called for. First there is the possibility of her predeceasing her husband which, somewhat arbitrarily in the complete absence of evidence as to her health, I would compute as being a twenty per cent. risk, requiring therefore a reduction of the sum of £150 to £120. Next there is the element of participation by the remaining children in the sharing of the burden of maintaining the mother. I have found no exact precedent for this calculation but since that dependency would have been unlikely to arise in any event during the lifetime of the father and since, at the time of his death, such of the other children as are then living may possibly be in a position to lend some support to the mother I would reduce the quantum of her dependency upon the deceased son by a further twenty per cent. of the above figure of £120, that is, to £96 per annum over fourteen years making £1,344 or Shs. 26,880/-, which I will treat as Shs. 27,000/-, and this is the amount therefore which I find to be the sum payable in respect of the mother's dependency upon the deceased.

Although the defendants have not suggested that a deduction should be allowed for the fact that the enjoyment of the fruits of dependency is being considerably accelerated, I have thought it proper to give consideration to this question particularly in regard to the case of the mother. Such a deduction was allowed in *Nance's* case (*supra*), a Canadian decision, and was allowed by the Court of Appeal for Eastern Africa in *Kassam's* case (*supra*) but was disallowed in the later case by the Privy Council on appeal, and this decision of the Privy Council is the most recent East Africa authority upon the matter. The opinion of the Board was expressed as follows:

"The Court of Appeal have made a deduction in respect of the acceleration of the benefit of the deceased's estate to his children. Their Lordships' view is that this is a highly speculative matter, and having regard to the anticipated savings which might reasonably have been expected to have been made by the deceased if he had lived, no deduction ought to be made on the score of accelerated benefit, as these two figures very largely cancel out."

In the present case not only was there the possibility of the deceased having accumulated further savings had he lived, which his obviously thrifty nature would seem to have rendered highly probable, but regard must be had to the almost certain fall in the purchasing power of money over the period of more than twenty years with which we are dealing, which is merely another way of saying that both the general cost of maintaining the father and, after him, the mother, and the measure of support which it may be assumed would have been made available by the deceased to meet the cost of their maintenance, would have increased in terms of money. The aim in assessing damages in a case such as the present is to estimate the loss of reasonable expectation of pecuniary

benefit, and this cannot be achieved by ignoring the fact that the rate of such benefits in the past, upon the basis of which the damages are *prima facie* being assessed, would almost certainly have of necessity been increased by the deceased, had he lived, in order to maintain the dependants in the same degree of comfort as previously. A further aspect of the question of a deduction for acceleration may perhaps also be borne in mind. As a matter of necessity the liability of the defendants is being computed in the form of a capital sum on the basis of a judicial assumption as to how long each of the dependants may reasonably be expected to live. It is not intended that the income from that sum, if invested, should be nearly sufficient to provide for their needs and it is accepted that resort will be had to the capital year by year, the aim being that the fund will run out simultaneously with the death of the last dependant. If the computation of the length of their respective lives should prove to have been excessive the unexpended balance of that capital sum will pass away from the dependants on death with no benefit to them, while if that computation should prove to have been an underestimate they may well be left in a state of impoverishment that it might be assumed would not have been their lot but for the death of the deceased through the negligence of the defendants. There is no practical method of providing against this factor (other than by the provision of a sinking fund, which would, no doubt, be a hardship on the defendants) but its bearing may add weight (if such addition were necessary) to the view that the making of a deduction in respect of the acceleration of benefits in a case such as the present would be a highly speculative venture and inappropriate in the circumstances.

In certain of the reported decisions consideration was given to the incidence of taxation, including income tax and death duties. There being no relevant evidence before me I have not directed my attention to this matter.

During the course of the argument I enquired from counsel for the defendants as to whether in his submission the adjustment to be made in respect of the financial benefits flowing directly from the death of the deceased, that is, the sum of Shs. 23,000/- and Shs. 8,000/- already referred to, should take the form of a deduction from the aggregate gross amount to be found due in respect of the losses suffered by both parents or only from that found due in respect of the father, and I understood him to say that the deduction should be made from the aggregate of these two amounts. Although this course appears to have been followed in some cases I am of the opinion, having regard to the fact that the entire of the deceased's estate devolves beneficially upon the father as the sole next-of-kin of the deceased to the exclusion of the mother, that in the present case the deduction in question should be borne by the father's share of the award alone. I have made my calculations accordingly though it does not affect the final result.

In the result, therefore, under the provisions of the Fatal Accidents Act I award a sum of Shs. 27,500/- (that is, Shs. 500/- and Shs. 27,000/-) to the administrator as damages suffered by the dependants of the deceased through the negligence of the defendants. The parties agreed at the hearing that it would not be necessary for me to direct a division of this sum under s. 4 (1) of the Act.

There will accordingly be judgment for the third plaintiff as administrator of the deceased against the defendants jointly and severally for the sum of Shs. 27,500/- under the Fatal Accidents Act in addition to the sum of Shs. 8,000/- payable under the Law Reform Act and the sum of Shs. 200/- for funeral expenses. Having regard to the considerations upon which the above sum of Shs. 27,000/- has been arrived at I consider that interest on the aggregate award of Shs. 35,700/- should run as from this date and not from the date of filing suit.

The third plaintiff has succeeded to the extent of obtaining awards totalling Shs. 35,700/- but of this

sum Shs. 8,000/- represents damages under the Law

Reform Act and is exactly equalled by the lodgement made by the defendants in regard to that portion of the claim. In the circumstances I direct that the third plaintiff shall have as against the defendants the general costs of the action to be taxed on the basis of the decretal sum of Shs. 35,700/- but to be reduced by one-fourth. The defendants shall abide their own costs. No order is made in respect of the first and second plaintiffs whose joinder in the suit appears to have been unnecessary.

Judgment for the plaintiff.

For the plaintiffs:

JJ Patel and Miss Gathani

JJ & VM Patel Nairobi

For the defendants:

P Le Pelley

Archer & Wilcock, Nairob